No. 87-712-CFX
Status: GRANTED

Docketed:
October 30, 1987

Vide:
87-929

See also:
87-372

Title: Otis R. Bowen, Secretary of Health and Human Services, et al., Petitioners
v.
Massachusetts

Court: United States Court of Appeals for the First Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Barnico,Thomas A.

NOTE* 8/19/87 ord. ext. time to file pet. granted to & inc. 9/30/87 by Brennan, J.; 9/22/87 ord. grant. further ext to & incl. 10/30/87

Entry	Date	Note	Proceedings and Orders
1	Aug 18 1987		Application for extension of time to file petition and order granting same until September 30, 1987 (Brennan, August 19, 1987).
2	Sep 18 1987		Application for further extension of time to file petition and order granting same until October 30, 1987 (Brennan, September 22, 1987).
3	Oct 30 1987	G	Petition for writ of certiorari filed.
4	Oct 30 1987		Appendix of petitioner Bowen, Sec. H&HS, et al. filed.
5	Dec 2 1987		Brief of respondent Massachusetts in opposition filed.
6	Dec 15 1987	X	Reply brief of petitioner Bowen, Sec. H&HS, et al. filed.
7	Dec 16 1987		DISTRIBUTED. January 8, 1988
8	Jan 11 1988		Petition GRANTED. The case is consolidated with 87-929, and a total of one hour is allotted for oral argument. **********
9	Feb 23 1988		Joint appendix filed. VIDED.
10	Feb 25 1988		Brief of petitioners Bowen, Sec. H&HS, et al. filed. VIDED.
11	Mar 11 1988		SET FOR ARGUMENT, Wednesday, April 20, 1988. (2nd case). This case is consolidated with 87-929. 1 hour.
12	Mar 25 1988		CIRCULATED.
13	Mar 29 1988	X	Brief amicus curiae of California filed. VIDED.
14	Mar 30 1988		Record filed.
		*	Certified copy of appendix and proceedings received. (4 volumes).
20	Mar 30 1988	X	Brief amici curiae of Victoria Grimesy, et al. filed. VIDED.
15	Mar 31 1988		Record filed.
		*	Certified copy of original record received.
16	Mar 31 1988		Brief amici curiae of Alabama, et al. filed. VIDED.
17	Mar 31 1988		Brief amici curiae of Council of State Governments, et al. filed. VIDED.
18	Mar 31 1988	X	Brief of respondent Massachusetts filed. VIDED.
19	Mar 31 1988	X	Brief amicus curiae of New York filed. VIDED.
21	Apr 2 1988		Lodging received.
22	Apr 13 1988	X	Reply brief of petitioners Bowen, Sec. H&HS, et al. filed. VIDED.
23	Apr 20 1988		ARGUED.

Supreme Court, U.S.
FILED
OCT 30 1987
F. SPANIOL, JR
CLERK

No. 87-712

In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether the United States Claims Court has exclusive jurisdiction over a civil action against the United States that includes both a Tucker Act claim for more than $10,000 in money damages and a claim for declaratory or injunctive relief involving the same issues as the Tucker Act claim, or whether such an action can be split into two lawsuits, with the district court and the regional court of appeals having jurisdiction over the claim for prospective relief, and the Claims Court having jurisdiction over the claim for retrospective relief.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, certain other officials of the Department of Health and Human Services were named as defendants in the district court and are petitioners here: William L. Roper, M.D., Administrator of the Health Care Financing Administration; and Norval D. Settle, Judith A. Ballard, and Donald F. Garrett, members of the Departmental Grant Appeals Board.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	3
Reasons for granting the petition	10
Conclusion	26

TABLE OF AUTHORITIES

Cases:

Alabama Rural Fire Ins. Co. v. *Naylor*, 530 F.2d 1221 (5th Cir. 1976)	21
American Science & Eng'g, Inc. v. *Califano*, 571 F.2d 58 (1st Cir. 1978)	21
Amoco Prod. Co. v. *Hodel*, 815 F.2d 352 (5th Cir. 1987), petition for cert. pending, No. 87-372	12, 14, 21, 23
Blassingame v. *Secretary of Navy*, 811 F.2d 65 (2d Cir. 1987)	18
Block v. *North Dakota*, 461 U.S. 273 (1983)	19, 20
Board of Education v. *Rowley*, 458 U.S. 176 (1982)	5
Boruski v. *United States*, 493 F.2d 301 (2d Cir.), cert. denied, 419 U.S. 809 (1974)	19
Carter v. *Seamans*, 411 F.2d 767 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970)	16
Chabal v. *Reagan*, 822 F.2d 349 (3d Cir. 1987)	16
Chappell v. *Wallace*, 462 U.S. 296 (1983)	19
Connecticut Dep't of Income Maintenance v. *Heckler*, 471 U.S. 524 (1984)	4
Cook v. *Arentzen*, 582 F.2d 870 (4th Cir. 1978)	16, 21
Denton v. *Schlesinger*, 605 F.2d 484 (9th Cir. 1979)	16
Eastport Steamship Corp. v. United States, 372 F.2d 1002 (Cl. Ct. 1967)	11
Green v. *Mansour*, 474 U.S. 64 (1985)	25
Hondros v. *Civil Serv. Comm'n*, 720 F.2d 278 (3d Cir. 1983)	24
International Eng'g Co. v. *Richardson*, 512 F.2d 573 (D.C. Cir. 1975), cert. denied, 428 U.S. 1048 (1976)	21
Irving Indep. Sch. Dist. v. *Tatro*, 468 U.S. 883 (1984)	10

Cases – Continued: Page

Lehman v. *Nakshian*, 453 U.S. 156 (1981) 20
Library of Congress v. *Shaw*, No. 85-54 (July 1, 1986) ... 20
Keller v. *MSPB*, 679 F.2d 220 (11th Cir. 1982) 16
Massachusetts v. *Departmental Grant Appeals Bd.*, 815 F.2d 778 (1st Cir. 1987) 7-8
Matthews v. *United States*, 810 F.2d 109 (6th Cir. 1987) .. 16
Minnesota ex rel. Noot v. *Heckler*, 718 F.2d 852 (8th Cir. 1983) 12, 13
New Mexico v. *Regan*, 745 F.2d 1318 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985) 12, 15
North Side Lumber Co. v. *Block*, 753 F.2d 1482 (9th Cir.), cert. denied, 474 U.S. 931 (1985) 21
Portsmouth Redevelopment & Housing Auth. v. *Pierce*, 706 F.2d 471 (4th Cir.), cert. denied, 464 U.S. 960 (1983) 12, 13, 14, 23
Rowe v. *United States*, 633 F.2d 799 (9th Cir.), cert. denied, 451 U.S. 970 (1980) 17
Sharp v. *Weinberger*, 798 F.2d 1521 (D.C. Cir. 1986) 21
Shaw v. *Gwatney*, 795 F.2d 1351 (8th Cir. 1986) 16
Smith v. *United States*:
654 F.2d 50 (Ct. Cl. 1981) 16, 24
823 F.2d 532 (Fed. Cir. 1987) 24
Utah Dep't of Health, Decision No. 893 (Departmental Grant Appeals Bd. Aug. 31, 1987) 11
United States v. *Hohri*, No. 86-510 (June 1, 1987) 18, 22, 23
United States v. *Mitchell*, 463 U.S. 206 (1983) 19
United States v. *Shaw*, 309 U.S. 495 (1940) 24
United States v. *Sherwood*, 312 U.S. 584 (1941) 20
Warner v. *Cox*, 487 F.2d 1301 (5th Cir. 1974) 12, 17, 21

Statutes and regulation:

Administrative Procedure Act:
5 U.S.C. (Supp. IV) 702 ..... 2, 8, 20, 21
5 U.S.C. 704 (§ 10(c)) 2, 20, 21
Social Security Act, Tit. XIX, 42 U.S.C. (& Supp. III) 1396-1396q 4
§ 1901, 42 U.S.C. (Supp. III) 1396 4
§ 1902(a)(5), 42 U.S.C. 1396a(a)(5) 10

Statutes and regulation – Continued: Page

§ 1902(a)(11), 42 U.S.C. 1396a(a)(11) 5
§ 1902(a)(17)(B), 42 U.S.C. 1396a(a)(17)(B) 5
§ 1902(a)(25), 42 U.S.C. 1396a(a)(25) 4
§ 1905(a)(15), 42 U.S.C. (& Supp. III) 1396d(a)(15) 4
§ 1905(d), 42 U.S.C. (& Supp. III) 1396d(d) 4
§ 1905(d)(1), 42 U.S.C. 1396d(d)(1) 4
Tucker Act:
28 U.S.C. 1346(a) 3
28 U.S.C. 1346(a)(2) 3, 11, 22
28 U.S.C. 1491 ..... 4, 8, 11
28 U.S.C. 1491(a) 3, 22
28 U.S.C. 1491(a)(1) 3
28 U.S.C. 1491(a)(2) 3, 21
28 U.S.C. 1295(a)(2) 23
28 U.S.C. 1500 26
Mass. Ann. Laws ch. 71B, § 12 (Law. Co-op. 1978 & Supp. 1987) 6
42 C.F.R. 441.13(b) 5

Miscellaneous:

House Comm. on Ways and Means, 100th Cong., 1st Sess., *WMCP 100-4, Background Material and Data on Programs Within the Jurisdiction of the Comm. on Ways and Means* (Comm. Print 1987) 5
1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* (2d ed. 1984) 19

In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-16a) is reported at 816 F.2d 796. One opinion of the district court (App. 17a-31a) is reported at 616 F. Supp. 687. The other opinion of the district court (App. 33a-35a) is reported at 622 F. Supp. 266. The orders of the district court respecting jurisdiction (App. 37a-38a) are unreported. Decisions No. 638 and No. 438 of the Departmental Grant Appeals Board of the Department of Health and Human Services (App. 39a-52a and 53a-84a) are unreported.

JURISDICTION

The judgments of the court of appeals (App. 85a, 86a) were entered on March 31, 1987. A petition for rehearing was denied on June 2, 1987 (App. 87a-88a). On August 19, 1987, Justice Brennan extended the time for filing a

petition for a writ of certiorari to and including September 30, 1987. On September 22, 1987, Justice Brennan further extended the time for filing a petition for a writ of certiorari to and including October 30, 1987.

STATUTES INVOLVED

5 U.S.C. (Supp. IV) 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. 704 provides in pertinent part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. * * *.

28 U.S.C. 1346(a) provides in pertinent part:

> The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:
>
> * * * * *
>
> (2) Any * * * civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort * * *.

28 U.S.C. 1491(a) provides in pertinent part:

> (1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * *.
>
> (2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. * * *.

STATEMENT

This action arises out of a dispute between petitioner and respondent over whether certain expenditures incurred by respondent in providing services at intermediate

care facilities for the mentally retarded were properly reimbursable under the Medicaid program. Respondent filed suit in the United States District Court for the District of Massachusetts, asking that court to "[e]njoin the Secretary and the Administrator from failing or refusing to reimburse the Commonwealth" for the disputed funds (App. 93a, 98a). The court of appeals found that this action presented both a "retrospective" claim for money damages against the United States, and a "prospective" claim for declaratory and injunctive relief. The court concluded that under the Tucker Act, 28 U.S.C. 1491, the United States Claims Court had exclusive jurisdiction over the retrospective part of the suit. However, insofar as the complaint sought prospective relief, the court held that the district court also properly had jurisdiction. Accordingly, the court reached the merits of the legal dispute between the parties, which it resolved in favor of respondent.

1. During the period 1978-1982, respondent received several hundred million dollars from the federal government in partial reimbursement for its costs in providing services at intermediate care facilities for the mentally retarded (ICFs/MR). ICFs/MR are generally eligible for reimbursement under Section 1905(a)(15) and (d) of the Medicaid statute, 42 U.S.C. (& Supp. III) 1396d(a)(15) and (d).[1]

The statute, however, limits reimbursable services at ICFs/MR in several important ways. For example, Medicaid covers only "medical assistance" and "rehabilitation and other services to help [the ultimate beneficiaries] attain or retain capability for independence or self-care" (42 U.S.C. (Supp. III) 1396; see also 42 U.S.C. 1396d(d)(1)). In addition, under 42 U.S.C. 1396a(a)(25) Medicaid is a "payor of last resort," that is, Medicaid will

[1] The Medicaid statute is Title XIX of the Social Security Act, 42 U.S.C. (& Supp. III) 1396-1396q. See *Connecticut Dep't of Income Maintenance* v. *Heckler*, 471 U.S. 524, 528-529 (1984).

not reimburse states for expenditures where a third party has an obligation to pay for the services in question.[2] Similarly, under 42 U.S.C. 1396a(a)(17)(B), the agency administering the state Medicaid plan is required to "tak[e] into account" such resources as are otherwise "available" to Medicaid applicants or recipients. See also 42 U.S.C. 1396a(a)(11).

To implement the statute's limitations on funding of ICFs/MR, the Secretary has adopted a regulation providing that payments to ICFs/MR "may not include reimbursement for vocational training and educational activities" (42 C.F.R. 441.13(b)). In implementing the regulation, the Secretary has taken the position that both "traditional" education and "special education" are excluded from Medicaid funding and, in determining whether a service constitutes "education," has looked particularly at whether it is provided by the state's educational authorities as opposed to public health care entities. This position stems both from the fact that "educational services" are distinguishable from medical assistance and rehabilitation, and from the fact that state educational authorities often are legally and financially obligated to provide certain services, under the auspices of "educational" programs, to all handicapped children (including those in ICFs/MR) irrespective of the availability of Medicaid coverage. See generally *Board of Education* v. *Rowley*, 458 U.S. 176, 179, 181 (1982). In the Secretary's view, therefore, a non-Medicaid program legally committed to provide such services without charge to the re-

[2] "Medicaid is intended to be the payer of last resort. Other available sources, including the legal liability of other third parties to pay, must be used before Medicaid begins payment." House Comm. on Ways and Means, 100th Cong., 1st Sess., *WMCP 100-4, Background Material and Data on Programs Within the Jurisdiction of the Comm. on Ways and Means* 302 (Comm. Print 1987).

cipient is deemed a "payor of first resort" whose independent obligation to afford the services negates any obligation of Medicaid to pay for them.

On two separate audits, which covered the years 1978-1982, auditors from the U.S. Department of Health and Human Services (HHS) determined that Massachusetts had included among the costs for which it had obtained Medicaid reimbursement various "special education" services provided to residents at ICFs/MR by the Massachusetts Department of Education (MDOE). All of the services in question were required by state law to be provided by the MDOE, which, moreover, was directed by law to "assume the costs of all aspects of the educational program" (Mass. Ann. Laws ch. 71B, § 12 (Law. Co-op. 1978 & Supp. 1987)). Because the auditors viewed the services in question as unreimbursable under the Medicaid statute and regulations, HHS disallowed $6,414,964 in federal financial participation for the period from July 1, 1978, to December 31, 1980, and $4,908,994 for the period January 1, 1981, through June 30, 1982 (see App. 17a, 34a).[3] Respondent appealed to the Departmental Grant Appeals Board (GAB) of HHS, which upheld both disallowances (*id.* at 39a-52a, 53a-84a). The disallowed amounts have since been recouped by petitioner by withholding a portion of certain advance reimbursements given to respondent for Medicaid expenses in years subsequent to the audit years.

2. In response to the GAB decisions, respondent filed two complaints in federal district court. Each complaint sought "judicial review of a final decision of the [GAB], which sustained the * * * disallowance of [a specified

[3] The amounts listed in text are the amounts that remain at issue in this case. Certain other, relatively minor disallowances resulting from the audits are no longer at issue. The disallowances amounted to roughly four percent of respondent's total costs claimed for ICFs/MR in the relevant periods.

monetary amount] in federal financial participation due to the Commonwealth of Massachusetts" (App. 89a-90a, 95a-96a). Under the heading "Requests for Relief," each complaint prayed that the court "[e]njoin the [defendants] from failing or refusing to reimburse the Commonwealth, or from recovering from the Commonwealth, the federal share of expenditures for medical assistance to eligible residents of intermediate care facilities for the mentally retarded during the period in question" (*id.* at 93a).

On January 11, 1984, the district court held (in a handwritten order) that it had jurisdiction (App. 38a). On August 27, 1985, the court issued an opinion granting summary judgment to respondent and overturning the GAB's first disallowance determination in its entirety (*id.* at 17a-31a). The court entered judgment on October 7, 1985, in which it "ordered and adjudged that the decision of the [GAB] which disallowed reimbursement to the Commonwealth of Massachusetts the sum of $6,414,964 in federal financial participation under the Medicaid program, 42 U.S.C. §§ 1396 *et seq.*, is reversed" (*id.* at 32a). Because respondent's second complaint raised the same legal issues as the first complaint, the district court likewise entered a memorandum and order and corresponding judgment holding for respondent on that complaint on November 25, 1985, and December 2, 1985 (*id.* at 33a-36a).

3. Petitioners appealed to the Court of Appeals for the First Circuit and argued, inter alia, that the district court had impermissibly entered a money judgment that only the United States Claims Court, under the Tucker Act, had the power to render. The court of appeals agreed with petitioners that respondent's lawsuits sought money judgments against the United States and that, to this extent, they had been improperly brought in district court. In so holding, the court of appeals reiterated, in abbreviated form, the reasoning of its decision one day earlier in *Massachusetts* v. *Departmental Grant Appeals Bd.*,

815 F.2d 778 (1st Cir. 1987). The court recognized that no suit against the United States for any form of relief may be maintained in the absence of a waiver of sovereign immunity. The court further acknowledged that the Administrative Procedure Act, 5 U.S.C. (Supp. IV) 702, permits only "action[s] * * * seeking relief other than money damages." Thus, the court held: "The district court may not * * * consider the claim for money past due. That claim is one for 'money damages' * * *." App. 5a. Insofar as a plaintiff sought to recover past-due money from the federal government, the court of appeals concluded, its sole remedy lay in the Claims Court under the Tucker Act, 28 U.S.C. 1491 (App. 5a).

Nevertheless, the court went on to hold that this did not mean the entire action had to be litigated in the Claims Court. The court reasoned that as long as "a grant-in-aid dispute concerns a legal question that has a significant, prospective effect on the ongoing relationship between the federal agency and the affected state"—in other words, as long as a dispute will affect the amount of money the state receives in the future as well as the amount of money (if any) past due—"the Administrative Procedure Act grants the district court jurisdiction to provide injunctive and declaratory relief" (App. 5a). Indeed, the court thought that such an action should proceed in district court in all but "the unusual situation in which the disallowance decision had no significant prospective effect [and] the challenge *only* concerned the money allegedly past due" (*id.* at 4a).[4] The court accordingly held that the district

[4] *Departmental Grant Appeals Board* had been such a challenge, because it concerned only services rendered in the past pursuant to a court order that was no longer in effect. Judge Coffin regarded that case as "a rare if not a unique one" (815 F.2d at 789 (concurring opinion)), foreshadowing the suggestion of the court in the present case that it would be highly unusual for a case *not* to be bifurcated into a Tucker Act challenge to disallowance of money allegedly past due and a "prospective" case that could proceed in district court.

court had properly reached the merits, except insofar as specific services rendered in the past were concerned (see *id.* at 7a & n.2). Significantly, the court added (*id.* at 6a):

> Should the Secretary persist in withholding reimbursement for reasons inconsistent with our decision, the Commonwealth's remedy would be a suit for money past due under the Tucker Act in the Claims Court. In that subsequent suit we assume that the Secretary would be collaterally estopped from raising issues decided here.

On the merits, the court held that petitioners, in determining that all services provided by the MDOE were nonreimbursable under Medicaid, had misconstrued the statute. Finding that "medical" and "educational" services are not necessarily mutually exclusive, the court took the view that "the Secretary [must] develop a Medicaid audit procedure that looks behind the state statutory label 'special education' to determine whether services are reimbursable" as "medical assistance" or "rehabilitation" services (App. 16a). The court also rejected petitioners' contention that the MDOE's independent statutory obligation to "assume the costs" of the services in question meant that Medicaid, as payor of last resort, was not liable for those services. Without citation of authority, the court opined that state agencies should not be treated as third parties vis-à-vis one another (*id.* at 13a).

REASONS FOR GRANTING THE PETITION

This case presents a recurring jurisdictional question that has been resolved inconsistently by the courts of appeals: whether it is proper, under the system of federal court jurisdiction established by Congress, to split a single action seeking both prospective and monetary relief against the United States into two cases – one to be tried in the district courts and the regional courts of appeals, the other to be heard in the Claims Court and the Federal Circuit. Numerous courts of appeals have recognized that such claim splitting is, at a minimum, undesirable, and have not allowed it. In our view, claim splitting is not merely undesirable, it threatens to undermine the very purpose of establishing a single, centralized forum for resolving all money claims against the United States, and is precluded by the jurisdictional scheme enacted by Congress. The federal government and its opposing parties are constantly litigating over this issue, and significant judicial resources are devoted to resolving it. The issue can be expected to plague the lower courts unless this Court provides guidance.[5]

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[5] The decision below on the merits is also important, potentially affecting hundreds of millions of dollars in Medicaid reimbursement throughout the nation. Moreover, the court of appeals' resolution of the merits was seriously flawed. The court substituted its own judgment for that of the Secretary, holding that the organization of any particular state government should not matter for purposes of determining who is and who is not a third-party payor, and that the Secretary must develop some (unspecified) technique to determine, on a case-by-case basis, which services provided by a state's educational agency and labeled "educational" by the state legislature are in fact "medical" as well. This fails to give sufficient weight to the judgment of Congress, which requires that the Medicaid program be administered by a "single State agency" (42 U.S.C. 1396a(a) (5)). It also stands in stark contrast to *Irving Indep. Sch. Dist.* v. *Tatro*, 468 U.S. 883, 891-895 (1984), where this Court was required to determine whether a particular service (clean intermittent catheterization),

1. a. This is one of a number of cases decided in recent years in which (1) an action has been brought in district court that includes a claim for more than $10,000 in money damages against the United States; (2) the district court has failed to recognize that such a claim is outside its jurisdiction; (3) the court of appeals has corrected that error on appeal and has either transferred the Tucker Act claim[6] to the Claims Court or dismissed that claim, and (4) the court of appeals has then considered, either implicitly or explicitly, whether the entire case should be heard in the Claims Court or whether, instead, the court of appeals should proceed to the merits. In all of

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already determined to be "educational," was or was not "medical" as well. Relying on a federal regulation that the Court said was entitled to deference, the Court concluded that the fact that the service was performed by a school nurse rather than a physician was sufficient to allow a federal agency to determine that the service was not medical. See also *Utah Dep't of Health*, Decision No. 893 (Departmental Grant Appeals Bd. Aug. 31, 1987), slip op. 9-11, 16-26 (criticizing the First Circuit's decision in this case). Nevertheless, although we view the decision on the merits as erroneous, no other court of appeals has addressed these issues, and therefore no conflict among the courts of appeals has developed. Accordingly, we are not now asking the Court to review this aspect of the judgments below.

[6] In speaking of a "Tucker Act claim" in this petition, we refer to a claim for more than $10,000 against the United States that satisfies the other requirements of 28 U.S.C. 1491, *i.e.*, is "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States," and is not a claim "sounding in tort." See also *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1007-1011 (Ct. Cl. 1967) (summarizing limitations on the type of claims that fall under the Tucker Act). When a plaintiff asserts a claim for $10,000 or less against the United States (or waives all Tucker Act recovery in excess of $10,000), such a suit can be heard in district court under 28 U.S.C. 1346(a)(2) – the so-called "Little Tucker Act."

these cases, any prospective relief that the plaintiffs have sought has depended on the same legal theories that underlay their Tucker Act claims. See *Amoco Prod. Co.* v. *Hodel*, 815 F.2d 352, 359-360 (5th Cir. 1987), petition for cert. pending, No. 87-372; *New Mexico* v. *Regan*, 745 F.2d 1318 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); *Minnesota ex rel. Noot* v. *Heckler*, 718 F.2d 852 (8th Cir. 1983); *Portsmouth Redevelopment & Housing Auth.* v. *Pierce*, 706 F.2d 471 (4th Cir.), cert. denied, 464 U.S. 960 (1983); see also *Warner* v. *Cox*, 487 F.2d 1301 (5th Cir. 1974). The decisions in these cases have not been consistent. In *Portsmouth Redevelopment*, *New Mexico*, and *Amoco*, the courts have transferred the entire case to the Claims Court. In the decision below, and in *Minnesota*, the courts have deemed themselves to have jurisdiction to decide the legal issues presented by the claim for prospective relief—including all issues common to the claim for money damages—even after recognizing that the Claims Court has exclusive jurisdiction over the monetary claim.

At one time, it appeared that the various decisions might be reconciled because each purported to apply some form of "primary purpose" test. This view held that a plaintiff whose primary purpose was to obtain past-due money was required to litigate his case in the Claims Court, but a plaintiff whose primary purpose was to obtain prospective relief could remain in district court in order to litigate the part of the case seeking such relief. See *New Mexico*, 745 F.2d at 1322; *Minnesota*, 718 F.2d at 859; *Portsmouth*, 706 F.2d at 474; see also *Amoco*, 815 F.2d at 362.[7] The decision below, however, explicitly

[7] The courts that have applied the "primary purpose" test provide almost no guidance as to how a court is to ascertain the subjective intent of the plaintiff, if indeed this is possible. They have, for the most part, merely announced their conclusion that the plaintiff's suit either did or did not have as its primary purpose the receipt of past-due money rather than the changing of an ongoing relationship. Compare App. 6a n.1 (views of Judge Breyer) with pp. 13-15, *infra*. The Eighth Circuit's *Minnesota* decision does attempt to provide an operational rule, but it is both arbitrary and probably unworkable. The Eighth Circuit apparently deems the prospective relief to be the primary aim of a lawsuit whenever the relationship stretches far enough into the future that the amount of money that the plaintiff stands to gain prospectively (if the court accepts the claim) exceeds the past disallowance that the plaintiff seeks to recover. See *Minnesota*, 718 F.2d at 859 (footnote omitted) ("The potential current and future [Medicaid] claims foregone dwarf the amount of the disallowance the State seeks to have overturned. * * * The prospective, independent significance of the declaratory relief requested makes it, not the compensatory money payments, the primary relief sought by the State of Minnesota."). This rule is arbitrary, because when a case involves nothing more than a running dispute over who will pay how much money to whom, it would make *jurisdiction* turn on the accident of how long the dispute has already festered (building up a large accrued claim for past damages) or how long it may endure (creating a large claim for prospective relief). Moreover, the test would inevitably present complex questions about whether the future damages should be discounted, and if so at what rate, and there are no clearly discernible standards for judicial resolution of these issues.

rejects the primary purpose test (App. 6a n.1) in favor of a test that requires bifurcation between the Claims Court and the district court in all cases in which the plaintiff invokes the jurisdiction of the district court and seeks both prospective and monetary relief (see p. 8 & note 4, *supra*). The First Circuit's test would have produced results directly contrary to the results that were in fact reached by the Fourth, Fifth, and Tenth Circuits in *Portsmouth Redevelopment*, *Amoco*, and *New Mexico*. The conflict among the circuits, accordingly, has been brought sharply into focus by the decision below.

Portsmouth Redevelopment was a suit to recover certain operating subsidies from the U.S. Department of Housing and Urban Development (HUD). The "annual contributions contract" under which the plaintiff sought to recover those subsidies was an ongoing one (see 706 F.2d at 472-473), and the district court's judgment in favor of the plaintiff would have affected the plaintiff's and

HUD's rights under that contract in the future as well as compelling the payment of $676,085 allegedly due in the past. The Fourth Circuit held that the plaintiff "primarily s[ought] monetary relief" (706 F.2d at 474) and for that reason directed transfer of the entire case to the Claims Court. Under the reasoning of the court of appeals in the present case, however, the "significant prospective effect" (App. 4a) of a ruling on the merits would have required splitting the case into two actions, and would have required the court of appeals to review the district court's judgment on the merits.

Amoco is an action to recover certain royalties paid under protest to the Department of the Interior by the plaintiff pursuant to a gas lease. Because the lease remains in effect (see 815 F.2d at 358), the district court's judgment rejecting the plaintiff's theories has a "significant prospective effect." Indeed, the Fifth Circuit acknowledged "Amoco's concerns about future audits on the * * * lease at issue in this case and about audits on other leases" (*id.* at 367). Yet that court has, without reaching the merits, directed transfer of the entire case to the Claims Court (*id.* at 368), holding that "Amoco seeks, as its 'primary objective' or 'ultimate aim,' * * * the return of some of the money it has paid the government" (*id.* at 362 (citations omitted)). The First Circuit's theory, however, would have required the court of appeals to reach the merits.[8]

[8] Amoco has filed a petition for a writ of certiorari (No. 87-372) in which it argues that the Fifth Circuit should have affirmed the district court's assumption of jurisdiction over the entire case. Amoco never suggested in the Fifth Circuit that the court bifurcate the case into a prospective and a retrospective case and thereby retain jurisdiction to decide the merits, and the questions presented in Amoco's petition for a writ of certiorari do not include the bifurcation issue, although the issue is briefly discussed in the body of the petition. The petition primarily focuses on the interrelationship of the Tucker Act and the Outer Continental Shelf Lands Act. We are responding to Amoco's petition today.

New Mexico was an action seeking to require the federal government to pay the State its statutory share of certain mineral royalties that the federal government had received, and was receiving on an ongoing basis, without first deducting the windfall profit tax. As the Tenth Circuit noted, New Mexico sought "to change in a significant manner the Secretary's methods of calculating the windfall tax and state royalties" (745 F.2d at 1320), a change that would not only require payment of money to New Mexico but also have a "dramatic national impact * * * when considering its future application to all federal lands" (*id.* at 1320 n.2). Nevertheless, the court transferred the entire case to the Claims Court (*id.* at 1323), holding that the action "is a claim for money cognizable under the [Tucker] Act [in which] New Mexico's additional requests * * * are merely incidental and subordinate to the basic suit for money" (*id.* at 1322). There is no doubt, however, that the approach taken in this case would have required the Tenth Circuit to retain jurisdiction over the case, as any judgment would have had, in the words of the First Circuit, a "significant prospective effect."

If *Portsmouth Redevelopment*, *Amoco*, and *New Mexico* were correctly decided, as we think they were (see pp. 17-26, *infra*), it follows that this case was wrongly decided and that the entire action should have been dismissed or transferred to the Claims Court.[9] This conflict among the circuits warrants this Court's attention.

[9] The conflict is not just between the "prospective significance" rationale of the decision below and the "primary purpose" rationale of the other cases, but a conflict in results as well. Even if a "primary purpose" test had been applied in this case, a decision that respondent's "primary purpose" was the obtaining of prospective relief rather than the allegedly past-due money could not fairly be reconciled with the way that the "primary purpose" test was applied to similarly situated litigants in *Portsmouth Redevelopment*, *Amoco*, and *New Mexico*, all of whom (like respondent) wanted their legal theories to be upheld so they could receive future money as well as past-due money.

b. In addition to conflicting with *Portsmouth Redevelopment*, *Amoco*, and *New Mexico*, the decision below conflicts with *Matthews* v. *United States*, 810 F.2d 109, 112 (6th Cir. 1987); *Keller* v. *MSPB*, 679 F.2d 220, 223 (11th Cir. 1982) (per curiam); *Denton* v. *Schlesinger*, 605 F.2d 484 (9th Cir. 1979); *Cook* v. *Arentzen*, 582 F.2d 870, 878 (4th Cir. 1978); and *Carter* v. *Seamans*, 411 F.2d 767 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970). In each of those cases, a plaintiff who had lost his or her military or civilian job with the federal government had filed a complaint seeking reinstatement and backpay. In each case, the court recognized that the backpay claim was one cognizable only in the Claims Court (or, before 1982, the Court of Claims, which no longer exists) and declined to allow the plaintiff to pursue his or her reinstatement action separately in district court. Adjudication of the reinstatement action by the district court, these courts held, would "effectively dispose[ ] of all issues concerning [plaintiff's] rights to backpay except the amount * * * [and thus] would substantially infringe on the Claims Court's exclusive jurisdiction over the backpay claim" (*Matthews*, 810 F.2d at 112).[10]

Such cases would certainly be resolved differently under the rationale of the decision below. An individual's claim for reinstatement has a very real and significant prospective effect apart from the payment of money allegedly past due. Indeed, although the reinstatement-and-backpay cases arise in a different context than the decision below, the relevant differences suggest that this is a much weaker case, not a stronger one, for splitting the action between

[10] For decisions that permit some form of claim splitting in the reinstatement-and-backpay context, see *Chabal* v. *Reagan*, 822 F.2d 349, 354 (3d Cir. 1987) (and other Third Circuit cases cited therein); *Shaw* v. *Gwatney*, 795 F.2d 1351, 1356-1357 (8th Cir. 1986) (and other Eighth Circuit cases); and *Smith* v. *United States*, 654 F.2d 50, 52 (Ct. Cl. 1981).

the Claims Court and the district court. In the reinstatement-and-backpay cases, the plaintiff is seeking not only a past and future stream of income, but also the right to hold a particular position or job, which may hold unique value to the plaintiff above and beyond the monetary compensation involved. In this case, in contrast, the only difference between "retrospective" relief and "prospective" relief is that one concerns money allegedly due in the past, and the other concerns money allegedly due in the future.[11] The decision below is therefore in conflict with decisions of the Sixth, Ninth,[12] and Eleventh Circuits, as well as the Fourth, Fifth, and Tenth.

2. All of the foregoing decisions agree that, in the absence of any other waiver of sovereign immunity, the Claims Court has exclusive jurisdiction over Tucker Act claims for money damages in excess of $10,000. The disagreement among the lower courts concerns the scope of the Claims Court's exclusive jurisdiction when the plaintiff combines a Tucker Act claim with a request for some other form of relief. The court of appeals below held that the exclusive jurisdiction of the Claims Court extends *only* to the claim for money damages. In this view, a "mixed" case involving both a claim for past-due money and a claim for prospective relief can be bifurcated, with the district court and the regional court of appeals deciding the claim for prospective relief, and the Claims Court and the Federal Circuit deciding the claim for money damages. Other courts, including the *Portsmouth*

[11] Cf. *Warner* v. *Cox*, 487 F.2d 1301, 1304 (5th Cir. 1974) (in holding that plaintiff's exclusive remedy for alleged nonpayment of money due under an ongoing contract with the federal government was an action under the Tucker Act, the court observed that "[n]one of the substantive claims presented to the court below concerned anything but the payment of money – when, how much, and by whom it should be paid").

[12] But see *Rowe* v. *United States*, 633 F.2d 799 (9th Cir.), cert. denied, 451 U.S. 970 (1980).

Redevelopment, Amoco, and *New Mexico* courts, and the courts deciding the reinstatement-and-backpay cases, have concluded that the Claims Court has exclusive jurisdiction over any case that *includes* a Tucker Act claim. Under this interpretation, claim splitting is prohibited.[13] If the plaintiff asserts only non-Tucker Act claims, or expressly waives any accrued Tucker Act claim, then the district court has exclusive jurisdiction. But if the the complaint, fairly construed, includes a Tucker Act claim for damages against the United States, and there is no other applicable waiver of sovereign immunity that would permit the action to proceed in district court, then the Claims Court has exclusive jurisdiction over the entire action. We respectfully submit that the latter view is the correct one, for three reasons.[14]

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[13] Our discussion in text is, of course, confined to cases in which the claims for prospective relief depend on the same legal theories that underlie the Tucker Act claim for money. Claim splitting is sometimes unavoidable when a Tucker Act plaintiff raises additional issues on the merits that form no part of his Tucker Act case. For example, a plaintiff who seeks relief under both the Tucker Act and the Federal Tort Claims Act must (unless his Tucker Act claim is for $10,000 or less) litigate in both the Claims Court and the district court. Cf. *United States* v. *Hohri*, No. 86-510 (June 1, 1987).

[14] As should be clear from the text, we do not agree with either the "primary purpose" test that some courts have applied or the "significant prospective effect" test applied below. Rather, we submit that there should be a simple rule that forbids claim splitting when, as in this case, all of the legal issues that the district court would resolve (if claim splitting were allowed) are legal issues that the Claims Court would necessarily resolve in adjudicating the money claim. Moreover, our concern primarily is with claim *splitting*, not with the particular choice of a single forum in which the litigation can proceed. Thus, we think there are circumstances in which a plaintiff may forgo or waive his Tucker Act claim and thereby remain in district court. Compare, *e.g.*, *Blassingame* v. *Secretary of Navy*, 811 F.2d 65, 69 (2d Cir. 1987) (allowing judicial review of decision of Board for Correction of Naval Records in district court and regional court of appeals because

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a. Because of sovereign immunity, it is "axiomatic" that the United States may not be sued without its consent. *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). When the United States does give its consent, and "Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed." *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). In this case, the court of appeals found that the only applicable waiver of sovereign immunity with respect to respondent's claim for money damages was the Tucker Act. And the Tucker Act, the court acknowledged, provides that such suits must be brought in the Claims Court. Accordingly, the court held that the Claims Court had exclusive jurisdiction over at least part of respondent's action—the claim for money damages.

As the court of appeals further acknowledged, the district court would have jurisdiction to hear the other part of respondent's action—the claim for prospective relief—only if there were some independent waiver of sovereign immunity applicable to such claims other than the Tucker Act. The court of appeals identified the Administrative Procedure Act (APA) as the other applicable waiver of sovereign immunity in this case (App. 4a).

Blassingame has expressly relinquished any claim for monetary relief"), with *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983) (noting general availability of judicial review of such decisions in the Claims Court). What a plaintiff in such a case should not be allowed to do—because he could have litigated his case in the Claims Court to begin with—is to use a favorable judgment obtained in the district court (by forgoing his Tucker Act claim) in order to seek a subsequent monetary judgment in the Claims Court on the basis of collateral estoppel. See 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.405[3], at 192 n.2 (2d ed. 1984) ("The principle that a plaintiff may not assert grounds for recovery that he could have asserted in a prior suit resolved by final judgment derives from the rule against splitting a single cause of action."); see also *id.* ¶ 0.410[1]; cf. *Boruski* v. *United States*, 493 F.2d 301 (2d Cir.), cert. denied, 419 U.S. 809 (1974).

Specifically, the court cited 5 U.S.C. (Supp. IV) 702, which provides that "[a]n action in a court of the United States seeking relief *other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party" (emphasis added).

However, the waiver of sovereign immunity in the APA, which of course must be strictly construed,[15] can extend no further than the cause of action created by that statute. Section 10(c) of the APA, 5 U.S.C. 704, provides: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." This section sets forth two possible causes of action: statutory review ("agency action made reviewable by statute") and nonstatutory or APA review ("final agency action for which there is no other adequate remedy in a court"). In this case, it is undisputed that there is no applicable statutory review provision. As respondent stated in its complaint: "No special statutory form of proceeding is provided for review of the decision of the Board" (App. 90a, 96a). Therefore, respondent was entitled to review under the APA only if it was challenging "final agency action for which there is *no other adequate remedy* in a court" (5 U.S.C. 704 (emphasis added)).

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[15] See, *e.g.*, *Block* v. *North Dakota*, *supra*; *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941) ("The section must be interpreted in the light of its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted."); see also *Library of Congress* v. *Shaw*, No. 85-54 (July 1, 1986), slip op. 7 ("we must construe waivers strictly in favor of the sovereign").

Here, respondent had no cause of action under the APA, because it had an adequate legal remedy in the Claims Court under the Tucker Act. Courts have often recognized that resolution of a Tucker Act suit in the Claims Court *can* be an "adequate remedy" that precludes APA review,[16] and such an action would clearly be fully adequate in the circumstances of this case (and in such similar cases as *Amoco*, *New Mexico*, *Minnesota*, and *Portsmouth Redevelopment*). First, this is simply a dispute about a stream of money payments over time. In such a case, final resolution of the legal dispute by the Claims Court would accomplish all of the plaintiff's litigation objectives: if the plaintiff prevails, it gets back all of the past-due money to which it is entitled, and it obtains a statement of the law that will bind the federal government in its future dealings with the plaintiff. See generally *Amoco*, 815 F.2d at 367; *Cook* v. *Arentzen*, 582 F.2d at 878 n.6. Second, although the Claims Court generally lacks the power to grant declaratory and injunctive relief as such, Congress has explicitly given it the power "to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just" (28 U.S.C. 1491(a)(2)). Thus, in any case (such as this one) involving review of agency action there

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[16] *American Science & Eng'g, Inc.* v. *Califano*, 571 F.2d 58, 62-63 & n.6 (1st Cir. 1978); *Alabama Rural Fire Ins. Co.* v. *Naylor*, 530 F.2d 1221, 1230 (5th Cir. 1976); *International Eng'g Co.* v. *Richardson*, 512 F.2d 573, 580-581 (D.C. Cir. 1975), cert. denied, 428 U.S. 1048 (1976); *Warner* v. *Cox*, 487 F.2d at 1304, 1306. Results similar to the results in these cases have been reached, without relying on 5 U.S.C. 704, in *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986), and *North Side Lumber Co.* v. *Block*, 753 F.2d 1482, 1485 (9th Cir.), cert. denied, 474 U.S. 931 (1985). In those cases, the courts have treated the Tucker Act as a statute that "impliedly forbids" an APA action within the meaning of 5 U.S.C. (Supp. IV) 702, rather than a statute that provides an "adequate remedy" within the meaning of 5 U.S.C. 704.

is little basis for any fear that a plaintiff forced to litigate its entire case in the Claims Court will ever receive less than adequate relief.

In short, under the Tucker Act respondent could have brought its action in the Claims Court. Because this action was "an adequate remedy in court," respondent had no cause of action under the APA. Because respondent had no APA action, the only applicable waiver of sovereign immunity was that provided by the Tucker Act. The Claims Court therefore had exclusive jurisdiction over the entire controversy.

b. In the Tucker Act, Congress has decreed that the Claims Court shall have exclusive jurisdiction of claims in excess of $10,000 against the United States. Compare 28 U.S.C. 1346(a)(2) (district court and Claims Court have concurrent jurisdiction over claims under $10,000), with 28 U.S.C. 1491(a) (Claims Court has jurisdiction over claims in excess of $10,000). The purpose of the Act clearly was to centralize all large monetary claims against the United States in a single court. See *United States* v. *Hohri*, No. 86-510 (June 1, 1987), slip op. 7 (recognizing that purpose of Tucker Act is to ensure uniformity of results in nontort actions involving more than $10,000). The claim splitting sanctioned by the court of appeals threatens to undermine this legislative objective. As the court of appeals construed the Tucker Act, any time a plaintiff appends a claim for prospective relief to a Tucker Act claim for monetary damages, the case must be bifurcated, with the district courts and the regional courts of appeals resolving any and all legal issues common to both claims for relief. This resolution of all common legal issues is then binding on the Claims Court by operation of collateral estoppel.[17] Rather than preserving the role of the

[17] The court's assumption about collateral estoppel (App. 6a-7a) was directly contrary to the usual rules of preclusion, which forbid claim splitting (see note 14, *supra*). If respondent had brought only its prospective claims in district court, ordinary principles of res judicata would have precluded respondent from maintaining a separate action for money damages at all, let alone maintaining an action in which the government would be collaterally estopped from contesting liability. Here, of course, it is the court of appeals, not respondent, that has split the claims.

Claims Court as the single tribunal charged with the uniform resolution of all legal issues presented in such cases, this construction promises to disperse legal actions against the United States for money across every district court in the land and twelve different regional judicial circuits. As the *Amoco* court put it, "asking for 'more' relief where monetary relief will satisfy the claimant's needs cannot defeat the jurisdictional scheme set up by Congress—to centralize money claims against the government, except those claims under $10,000 and those sounding in tort, in the Claims Court" (815 F.2d at 367; accord *Portsmouth Redevelopment*, 706 F.2d at 474).[18]

Indeed, the judgment below, by allowing the jurisdiction of the Claims Court to be defeated by artful pleading in any case involving an ongoing or potentially repetitious

[18] Ironically, under the approach taken by the court of appeals, a plaintiff who improperly brings a Tucker Act claim for more than $10,000 in district court may obtain an adjudication of the merits of his claim, so long as he also requests (or is deemed to have requested) "prospective" relief. But a plaintiff who properly brings a Little Tucker Act action in district court must pursue or defend any appeal in the United States Court of Appeals for the Federal Circuit, whether or not he also requests prospective relief. Under 28 U.S.C. 1295(a)(2), the Federal Circuit has exclusive jurisdiction over any final decision of a district court "if the jurisdiction of that court was based, *in whole or in part*," on the Little Tucker Act (emphasis added). Cf. *United States* v. *Hohri*, No. 86-510 (June 1, 1987). It is exceedingly difficult to believe that Congress, whose very strong desire to centralize the adjudication of Tucker Act claims has been recognized by this Court (*Hohri*, slip op. 6-8 & n.4), intended that this purpose could be so easily bypassed in Big Tucker Act cases through the device of claim splitting.

dispute, threatens to reduce the Claims Court to the role of a mere paymaster. This Court has previously rejected attempts to defeat the sovereign immunity of the United States by the subterfuge that a " 'judicial ascertainment' of credits" is somehow different from a "judgment" against the United States. *United States* v. *Shaw*, 309 U.S. 495, 504 (1940). It should do so here as well, by construing the Tucker Act to mean that the exclusive jurisdiction of the Claims Court extends to any case that *includes* a Tucker Act claim for money damages against the United States.

c. Claim splitting not only undermines the central role of the Claims Court, it generates delay, duplication of effort, confusion, and conflict. Under the rationale of the court of appeals, if the plaintiff proceeds in the district court and prevails, then a second action must be brought in the Claims Court. As a result, every lawsuit against the United States that involves claims to both prospective and retrospective relief has the potential of multiplying into two lawsuits. This inevitably creates additional delay and waste of resources, both judicial and otherwise.[19] Furthermore, if the district courts and/or regional court of appeals decide all common issues in the case, and if collateral estoppel is applied in the way the court of appeals assumed it would be, additional problems would arise in applying those general legal principles to specific claims for

[19] For example, see *Smith* v. *United States*, 654 F.2d 50 (Ct. Cl. 1981) (refusing to accept district court's transfer of backpay portion of reinstatement-and-backpay case); *Hondros* v. *Civil Serv. Comm'n*, 720 F.2d 278 (3d Cir. 1983) (resolving merits of same case in reinstatement context); *id.* at 299 n.40 (views of Chief Judge Seitz) (disagreeing with decision of Court of Claims not to accept jurisdiction); *id.* at 302-303 (Adams, J., concurring) (agreeing with decision of Court of Claims not to accept jurisdiction); *Smith* v. *United States*, 823 F.2d 532 (Fed. Cir. 1987) (14 years after events in question, and at least 11 years after litigation began, finally resolving the merits of plaintiff's backpay claim for his removal from position as a deputy marshal).

monetary relief. In contrast to the usual situation in which a court of appeals decides controlling legal issues and remands to a lower court, which is subject to its review and supervision, here the application of general principles to specific facts is entrusted to the Claims Court, which is subject to review only by the Federal Circuit. Thus the claim-splitting solution endorsed by the First Circuit would create not only delay and duplication of effort, but also a serious potential for intercircuit friction and conflict.

Finally, the court of appeals' judgment gives rise to new opportunities for forum shopping. Under the First Circuit's construction of the Tucker Act, plaintiffs who have Tucker Act claims have the option, in all but the rare case in which the lawsuit focuses exclusively on past, nonrecurring events, of obtaining an adjudication on the merits in either the Claims Court and the Federal Circuit, or a district court and its regional circuit. Thus, if a plaintiff thinks a particular district court or regional court of appeals will be more sympathetic to his claim than the Claims Court, he can file an action for a declaratory judgment in district court, and if successful, use collateral estoppel to convert a favorable judgment into a collection action in the Claims Court. Cf. *Green* v. *Mansour*, 474 U.S. 64, 73 (1985) (condemning similar attempt to obtain money judgment in state court by first obtaining declaratory judgment in federal court, given state's immunity from award of money damages directly by federal court). Conversely, if a plaintiff thinks the Claims Court will be more sympathetic than a district court, he can go first to the Claims Court, and have the central legal issues resolved there. We submit that no legitimate interest of any party or of the judicial system requires such a result. Every legal issue that is decided by the district court and regional court of appeals under the First Circuit's claim-splitting scheme is one that would necessarily be decided

by the Claims Court if the entire litigation were allowed to proceed there.[20]

The APA's waiver of sovereign immunity may be a broad and general one, but it is not without its limits. Certainly it does not compel claim splitting, nor does it permit the kind of end run around the Tucker Act that has been made in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[20] There is absolutely no indication that Congress ever intended to permit claim splitting. Indeed, the Judicial Code strongly suggests that Congress regarded it as undesirable. See 28 U.S.C. 1500 ("The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who * * * [was] acting or professing to act * * * under the authority of the United States."). The courts that have permitted claim splitting seem to regard it as a curious side effect of the interaction of the Administrative Procedure Act and the Tucker Act (see App. 5a-6a), not as a procedure that Congress ever considered and intended.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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10 pp

TABLE OF CONTENTS

	Page
Appendix A (Court of Appeals' Opinion dated 3/31/87)	1a
Appendix B (District Court's Memo and Order dated 8/27/85)	17a
Appendix C (District Court's Judgment dated 10/7/85)	32a
Appendix D (District Court's Memo and Order dated 11/25/85)	33a
Appendix E (District Court's Judgment dated 12/2/85)	36a
Appendix F (District Court's Orders dated 11/8/83 and 1/11/84)	37a
Appendix G (HHS Decision dated 3/29/85)	39a
Appendix H (HHS Decison dated 5/31/83)	53a
Appendix I (Court of Appeals' Judgments dated 3/31/87)	85a
Appendix J (Court of Appeals' Order Denying Rehearing dated 6/2/87)	87a
Appendix K (Complaint dated 6/5/85)	89a
Appendix L (Complaint dated 8/26/83)	95a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 86-1109, 86-1118

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF-APPELLEE,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT, APPELLANT.

COMMONWEALTH OF MASSACHUSETTS, DEPARTMENT OF PUBLIC WELFARE, PLAINTIFF, APPELLEE,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT, APPELLANT.

Argued Oct. 8, 1986

Decided March 31, 1987

Before: COFFIN, BREYER and TORRUELLA, Circuit Judges.

TORRUELLA, Circuit Judge.

This is an appeal from a district court judgment reversing a Medicaid disallowance decision of the Secretary of Health and Human Services. The appeal raises both a complex jurisdictional issue and a difficult question of statutory interpretation under the Medicaid Act. For the

reasons that follow, we affirm the district court on the merits, yet vacate the monetary judgment assessed against the Secretary.

I. *Introduction*

The Medicaid program is a joint federal-state program. The states administer its day to day operation and the federal government pays part of the cost under an arrangement in which the Secretary "reimburses" the states in advance. If on audit the Secretary disallows certain expenditures as not covered by the Medicaid statute or regulations, the money paid in advance of those expenditures is withheld from subsequent advance reimbursements. The states' decisions about what service to provide, in interaction with the Secretary's disallowance decisions, determine in large part the nature and extent of the Medicaid program.

As authorized by the Medicaid Act, Massachusetts provides services to the mentally retarded in public institutions known as intermediate care facilities for the mentally retarded ("ICF/MR"). 42 U.S.C. § 1396d. Massachusetts Department of Mental Health ("DMH") and Department of Education ("DOE") personnel work together to provide these services, using a transdisciplinary approach designed, at least in part, to help the ICF/MR residents achieve some degree of independence and self-care. The mental health staff performs work pursuant to Massachusetts mental health statutes and regulations, and the education staff carries out duties pursuant to Chapter 766 of the Massachusetts St.1972, which relates to "special education."

In two audits affecting the period July 1, 1978 through June 30, 1982, the Secretary took the position that all services provided by DOE personnel and contractors are *per se* "educational" and thus excluded from Medicaid coverage under the Secretary's regulation in 42 C.F.R. § 441.13(b).

The Secretary disallowed three service costs that are in dispute here:

1. Service delivery contracts with school committees and one regional vocational school to provide services required by Chapter 766 regulations that existing state staff could not provide,
2. Contracts to perform evaluation and monitoring functions required by Chapter 766, and
3. Salaries of DOE staff who work with ICF/MR residents in accordance with the goals of the "individual educational plans" required by Chapter 766.

Massachusetts appealed the disallowances to the Grant Appeals Board (GAB) of HHS. The GAB affirmed the disallowances, ruling that they result from the Secretary's interpretation of his own regulation, which is entitled to great deference. *See* Massachusetts Department of Public Welfare, Grant Appeals Board Decision No. 438 (May 31, 1983). On appeal, the District Court reversed, noting that the Secretary determines compliance wih Medicaid regulations

> by reference to state and federal education statutes and to the Commonwealth's method of administering the services in question, *rather than to the nature of the services themselves.* This approach errs on the side of administrative convenience at the expense of compliance with the Medicaid statute . . . .

Commonwealth of Massachusetts v. Heckler, 616 F.Supp. 687, 694 (D.Mass. 1985) (emphasis supplied). The District Court ruled that Massachusetts should be reimbursed, according to the Medicaid statutory formula, for all of the service costs listed above. The Secretary appealed.

II. *Jurisdiction*

We have recently had the opportunity to consider the jurisdiction of district courts over the Secretary's Medicaid

disallowance decisions. *See Commonwealth of Massachusetts v. Departmental Grant Appeals Board,* 815 F.2d 778 (1987) ("*Grant Appeals Board*"). *Grant Appeals Board* held that the district court does not have jurisidiction to hear a Medicaid disallowance challenge that is wholly retrospective in nature, because such a challenge seeks "money damages." And under the general right of review provided by the Administrative Procedure Act, 5 U.S.C. § 702, the district courts have jurisdiction to hear only suits "seeking relief other than money damages." *See Grant Appeals Board,* at 781-783; *Wingate v. Harris,* 501 F.Supp. 58, 62 (S.D.N.Y.1980).

The disallowance decision at issue in this case, unlike that at issue in *Grant Appeals Board* however, represents an ongoing policy that has significant prospective effect. The structure of the Medicaid program (in which the Secretary "reimburses" the states in advance) makes it inevitable that disallowance decisions concern money past due. Yet the Secretary uses these decisions to implement important policies governing ongoing programs. *Grant Appeals Board* concerned the unusual situation in which the disallowance decision had no significant prospective effect; the challenge *only* concerned the money allegedly past due.

Here, in contrast, the interpretation of the Medicaid Act announced in the disallowance decision affects far more than any money past due. The special education exclusion defines the respective roles of the Commonwealth and HHS in a continuing program. The Commonwealth's complaint challenging this statutory interpretation makes this prospective effect clear. Under the heading "Requests For Relief," the Commonwealth requested that the court do the following:

> 1. Enjoin the Secretary and the Administrator from failing or refusing to reimburse the Commonwealth or from recovering from the Common-

> wealth the federal share of expenditures for medical assistance to eligible residents of intermediate care facilities for the mentally retarded.
>
> 2. Set aside the Board's Decision No. 438.
>
> 3. Grant such declaratory and other relief as the Court deems just.

GAB Decision No. 438 consists of not only a refusal to pay money, but also a statement of law governing the ongoing relationship between the Commonwealth and HHS. The requested injunction is not specific to the retrospective, 1978-1982 reimbursement disallowed by the Secretary. Rather, it stretches into the future, as does the legal relationship between the parties. Prospective relief is important to the Commonwealth both because the ICF/MR program is still active and because the legal issues involved have ramifications that affect other aspects of the Medicaid program. What is at stake here is the scope of the Medicaid program, not just how many dollars Massachusetts should have received in any particular year.

A comparison of this decision with that in *Grant Appeals Board* reveals some of the contours of the § 702 money damages exclusion. Where a grant-in-aid dispute concerns only money past due, and no statute specifically authorizes a suit in district court, the Tucker Act provides the only applicable waiver of sovereign immunity; the case must go to the Claims Court, *See Grant Appeals Board,* at 785. But, where a grant-in-aid dispute concerns a legal question that has a significant, prospective effect on the ongoing relationship between the federal agency and the affected state, the Administrative Procedure Act grants the district court jurisdiction to provide injunctive and declaratory relief. The district court may not, however, consider the claim for money past due. That claim is one for "money damages" governed by our decision in *Grant Appeals Board, supra.* While this prospective/retrospective distinction "admittedly elevates from [*sic*] over func-

tion," *Kozera v. Spirito*, 723 F.2d 1003, 1008 (1st Cir.1983), it nonetheless is required by the Administrative Procedure Act's exclusion of suits seeking money *damages*. *See State of Minnesota by Noot v. Heckler*, 718 F.2d 852, 858 (8th Cir.1983).[1]

Accordingly, the district court below had jurisdiction to review the disallowance decision of the Grant Appeals Board and to grant declaratory and injunctive relief. The district court could not, however, order the Secretary to pay the money. On remand the district court should send the case back to the Secretary for action consistent with the Medicaid Act as interpreted in this decision. Should the Secretary persist in withholding reimbursement for reasons inconsistent with our decision, the Commonwealth's remedy would be a suit for money past due under the Tucker Act in the Claims Court. In that subsequent suit we assume that the Secretary would be collaterally estopped from raising issues decided here. *See* Wright, *Law of Federal Courts* 682 (1983) ("if an issue of fact or

[1] This approach differs from the "prime objective" approach in one significant way. *See New Mexico v. Regan*, 745 F.2d 1318, 1322 (10th Cir. 1984). The prime objective approach looks at the subjective intention of the party bringing the suit and asks "what was the primary pupose in bringing this suit?" If the answer is "to obtain money," then the suit goes to the Claims Court. The aproach in this case, on the other hand, looks at the effect of the judgment sought and not the intention of the complainant, other than as that intention bears on the retrospective or prospective effect of the relief sought. In many, and perhaps most, grant in aid cases the results of the two analyses will be the same. But the retrospective/prospective analysis should prove both easier to make and more consistent than an inquiry based on the intention of the state bringing the suit. Furthermore, sovereign immunity, which is what this § 702 problem is all about, concerns the willingness of the sovereign to subject itself to suit. That willingness turns on what the suit will require the sovereign to do, rather than why the suit was brought, and we read § 702 accordingly. Judge Breyer believes that these two tests come to the same thing and that both are satisfied here.

law was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent claim between the parties, whether on the same or a different claim").

III. *The Merits*

Deciding the merits of this case requires a close analysis of the Medicaid statute, Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, and an examination of the basis of the Secretary's decision.

Because we are limited to granting declaratory and prospective relief, we will only consider the merits of the special education exclusion and not whether the Secretary should have reimbursed for the specific services at issue in this case.[2] The Secretary argues that a special education exclusion follows from a reasonable interpretation of his own regulation, which is itself a reasonable interpretation of the Medicaid Act, and should therefore be affirmed. We acknowledge that the Secretary's interpretation of his own regulation is entitled to great deference. *See United States v. Larionoff*, 431 U.S. 864, 872-73, 97 S.Ct. 2150, 2155-56, 53 L.Ed.2d 48 (1977). Nevertheless, the Secretary may not interpret his regulation in contravention of the enabling statute, which is what the District Court found took place in this case. Consequently, our decision will focus on statutory, rather than regulatory, interpretation. And while the Secretary's interpretation of his enabling statute is entitled to some weight in our analysis, *see*

[2] We note that even if we could reach this issue we would have no evidentiary basis for deciding whether these particular services are "medical assistance" or not. The most we could do is remand. *See Sarasota, Florida v. F.A.A.*, 799 F.2d 674, 680-81 (11th Cir. 1986). For the same reason, our declaratory relief is limited to invalidating the special education exclusion and does not extend to a declaration that the Secretary must reimburse for these services henceforth.

Miller v. Youakim, 440 U.S. 125, 144-45 n. 25, 99 S.Ct. 957, 968-69 n. 25, 59 L.Ed.2d 194 (1979), it is not entitled to the same deference as an interpretation of his own regulation. Furthermore, in a dispute between the Secretary and a state over the meaning of the Medicaid statute, our usual deference must give way somewhat to the cooperative federalism goals of the Medicaid program.

Our review stems from § 706(2)(C) of the Administrative Procedure Act which authorizes courts to set aside agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). In such a review we accept the facts as stated by the Secretary, as long as they are supported by substantial evidence, and decide all questions of law *de novo*. In this case the facts are not in dispute.

A. ***The Statutory Framework***

The Medicaid Act comprises Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq*. The Social Security Act in general, and the Medicaid title of that Act in particular, is one of the most complex statutes Congress has ever enacted. *See Schweiker v. Gray Panthers*, 453 U.S. 34, 43, 101 S.Ct. 2633, 2640, 60 L.Ed.2d 460 (1981). Over time the Act has grown by accretion, rather than careful planning. Be that as it may, we have to make sense out of the accretions and their accompanying contradictions and silences. To that effect we are to be guided by, but not bound to, the Secretary's experience and expertise in working with the statute. We must also be responsive to "the general principle that the Social Security Act should be broadly construed, so as to carry out Congress' intent to provide medical expense coverage for all qualifying individuals." *Mayburg v. Secretary of Health and Human Services*, 740 F.2d 100, 103 (1st Cir.1984).

The first section of Title XIX states the broad purposes of the Medicaid Act as follows:

> For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter.

42 U.S.C. § 1396. The appropriation for achieving these purposes is automatic, as is the Secretary's corresponding payment to the states for costs incurred in pursuit of these goals and in compliance with the statute. The Medicaid Act provides that "[f]rom the sums appropriated therefor, the Secretary . . . shall pay to each State . . . an amount equal to the Federal medical assistance percentage . . . of the total amount expended . . . as medical assistance." 42 U.S.C. § 1396b. If something is "medical assistance" the Secretary must pay a percentage of its costs. Thus, the determination of whether a service is medical assistance is central to the reimbursement decision.

The Act defines "medical assistance" to mean, among other things, "payment of part or all of the cost of . . . intermediate care facility services." 42 U.S.C. § 1396d(b). Accordingly, if something is an "intermediate care facility service" the Secretary must reimburse. "Intermediate care facility services" are themselves defined as follows in relevant part:

> The term "intermediate care facility services" may include services in a public institution (or distinct part thereof) for the mentally retarded or persons with related conditions if –

> (1) the primary purpose of such institution (or distinct part thereof) is to provide health or rehabilitative services for mentally retarded individuals and which meet such standards as may be prescribed by the Secretary. . . .

42 U.S.C. § 1396d(d). While this last definition is far from complete, it does make clear that, like "medical assistance" generally, intermediate care facility services include both "health" and "rehabilitative" services. And, under § 1396 "rehabilitation" includes "services to help . . . families and individuals attain or retain capability for independence or self-care." Massachusetts claims that the disputed services provided by DOE to residents of the ICF/MR's are for such rehabilitation.

B. ***The Secretary's Interpretation: The Medical/Educational Dichotomy***

The Secretary disallowed the services because they were provided by Department of Education personnel and contractors pursuant to the state special education law, Mass.St.1972 ch. 766. Under the Secretary's regulations, "intermediate care facility services" are limited to health and rehabilitation activities and not "vocational training and educational activities." *See* 42 C.F.R. § 441.13(b). The Secretary interprets this educational prohibition to extend to "special education." *See, e.g.*, Oklahoma Department of Human Services, Grant Appeals Board Decision No. 367 (Dec. 17, 1982). According to Department policy, "special education" includes all services provided as special education under a state special education statute, whether or not such services would be considered reimbursable "medical assistance" if not covered by the state statute. In other words, the Secretary defines "intermediate care facility services" and "educational activities" to be mutually exclusive categories whose boundaries are determined, in important part, by state special education law.

The Secretary offers three primary arguments in favor of his interpretation of "intermediate care facilities." First, Congress did not intend to reimburse states for any "special education" services, because those services are provided under state special education programs that qualify the states to receive Federal money under the Education for All Handicapped Children Act, 20 U.S.C. § 1401 *et seq.* Second, under the Medicaid statute, 42 U.S.C. § 1396(a)(25), HHS is a payor of last resort that may not reimburse when any state agency has a statutory obligation to pay for services. And third, under 42 U.S.C. § 1302 the Secretary has discretion to interpret incompletely defined terms in the Medicaid statute; the interpretation in question is a reasonable one that is consistent and longstanding and, as such, is entitled to great deference. We will treat each of these arguments in turn.

1. ***The Education for All Handicapped Children Act***

The Education for All Handicapped Children Act (EHCA), 20 U.S.C. § 1401 *et seq.*, set up a federal funding mechanism for state-provided special education and related services. The Secretary claims that by setting up this mechanism in 1975, Congress meant to preclude any funding for special education services under the 1971 intermediate care facility services amendment to the Medicaid Act. The Secretary argues, essentially, that because Congress specifically funded special education services under the EHCA, it did not intend to fund any special education services under the more general terms of the pre-existing Medicaid statute.

The EHCA provides grants for some special education costs to states that set up an acceptable special education program. *See* 20 U.S.C. § 1412. The special education services at issue in this case include some services which Massachusetts is required to provide as "special education" in order to receive EHCA grants and some services which

go beyond the EHCA minimum. *See* 34 C.F.R. §§ 300.13, 300.14; Massachusetts Department of Public Welfare, Grant Appeals Board Decision No. 438, slip op. at 14-15 (May 31, 1983). None of the service costs at issue have been paid for by EHCA or other federal funds.

The Secretary's argument applies only to the EHCA minimum services. If applied to services above the EHCA minimum it would directly contravene the intent of the EHCA: providing free special education and related services to all handicapped children. Removing from Medicaid coverage any service which a state voluntarily provided to all children free of charge, without any resulting federal benefit, would discourage states from providing such a service and penalize EHCA beneficiaries who are not eligible for Medicaid.

With regard to the EHCA minimum services, the chief problem with the Secretary's argument is the timing of the enactment of the two statutes. The EHCA was enacted four years after the intermediate care facility services amendment. The EHCA manifests no intent to cut back on the scope of reimbursable intermediate care facility services. In fact, the legislative history of the EHCA states:

> Any funds available from the Federal government are *clearly in addition to funds provided under this act* and are available to states to assist them in carrying out their responsibilities under State laws, state constitutions, and the U.S. Constitution.

1975 U.S.Code, Cong. Admin. News 1425, 1447 (emphasis supplied). Accordingly, we find that the EHCA did not modify the Medicaid Act to prohibit funding of special education services.

2. *Medicaid as Payor of Last Resort*

The concept of payor of last resort in the Medicaid program comes from the Medicaid Act's requirement that the

state administering agency "ascertain the legal liabilities of third parties to pay for care and services (available under the [Medicaid] plan)" and refuse to provide that care or service, or, where the agency has already provided care, "seek reimbursement for such assistance to the extent of legal liability." 42 U.S.C. § 1396a(a)(25). The Secretary argues that the Massachusetts Department of Education is a "third party" with an independent obligation under state law (ch. 766) to pay for the services in question here and that, therefore, DOE's costs in providing the services cannot be borne by the Medicaid program.

This third party liability argument is a variation on the EHCA theme outlined in the previous section. Prior to the EHCA even the Secretary would admit that DOE had no third party liability. And because Congress clearly intended that the EHCA not divest states of existing funding sources, a state statute enacted to obtain EHCA funding should not be read to create a third party liability that divests a state of any Medicaid funding.

Independent of the EHCA theme and variation, the third party liability arguments fails because the DOE chapter 766 program is not a "third party" to the Department of Public Welfare, the state agency that administers the Medicaid program in Massachusetts. Both agencies, along with the DMH, are subdivisions of the Commonwealth of Massachusetts, which brought them into being to serve complementary social welfare goals. That they even appear to be "third party" to one another is an artifact of the Commonwealth's internal organization. Were Massachusetts to reorganize and create one "super agency" to take over the functions of all three departments, the Medicaid and special education programs would not change, yet the Secretary's third party argument would disappear. This Medicaid reimbursement decision should not turn on how a state subdivides its social welfare functions and authority.

3. *Agency Discretion to Interpret the Medicaid Statute*

The Medicaid Act authorizes the Secretary to "make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of" the Medicaid program. 42 U.S.C. § 1302. This provision gives the Secretary authority to make reasonable regulations such as the general educational exclusion regulation in 42 C.F.R. § 441.13(b). As the Secretary argues, and we acknowledge, the education regulation is a reasonable interpretation of the Medicaid Act's limitation of funding under § 1396 to "medical assistance" and "rehabilitation and other services to help . . . individuals attain or retain capability for indepedence of [*sic*] self-care."

The Secretary argues further that he is entitled to great deference in interpreting such a reasonable regulation and that, therefore, his special education exclusion should be upheld. As we stated earlier, the Secretary does have considerable latitude to interpret his own regulation without interference from the courts. But, that latitude does not extend to an interpretation that contravenes the statute that the regulation is supposed to implement. In this case, the blanket special education exclusion violates the Medicaid Act because it excludes from reimbursement services which the Medicaid Act requires the Secretary to reimburse.

This case illustrates a problem that can result from an interpretive regulation that requires an agency to make an inquiry that the enabling statute does not mention. Here, the education regulation requires the Secretary to determine whether a given service is educational; but the Medicaid Act refers only to medical assistance. Making an inquiry into whether a particular service is "educational" does seem to be a fair way to decide whether, on the whole, it is medical assistance. What most people think of as education (what the district court below referred to as

"traditional academic education") is not "medical assistance" under Medicaid. But the reasonableness of this inquiry depends on the meaning the Secretary gives to the word "education." If the concept of "education" is expanded to include, for example, teaching a severely retarded child to control the rate at which he is fed so that he does not get food into his lungs (one of the "special education" services at issue in this case), then the exclusion goes beyond statutory authority. According to chapter 766, such a service is special education. But, as the District Court found upon review of specific evidence, this service is also a "health or rehabilitative service" covered by § 1396d(d). *See Commonwealth of Mass. v. Heckler*, 616 F.Supp. at 692-93. It is thus reimbursable "medical assistance."

As the Secretary acknowledges, the concepts embodied in the terms "education" and "medical assistance" overlap. When they do, it is simply wrong to find that the concept "education," which comes from the regulations, controls over the concept "medical assistance," which is contained in the statute. Yet this error exactly describes the Secretary's position, as a recent Grant Appeals Board decision in a similar case makes clear. *See* Pennsylvania Department of Public Welfare, Decision No. 777 (August 20, 1986). In that case, the Board stated baldly "the relevant question concerning the nature of the services is whether the services are educational, since [federal reimbursement] is prohibited in such services *whether or not they are also within the scope of Title XIX*." *Id.* at p. 17 (emphasis supplied). The Secretary would have us turn the statute on its head, an invitation which we decline. The relevant question raised by the statute is whether the services are "medical assistance," which, as we have now stated repeatedly, includes ICF/MR "services to help . . . individuals attain or retain capabilities for independence or self care." 42 U.S.C. § 1396. Accordingly, the Secretary

may not determine whether a service is included in the Medicaid program by sole reference to a state' special education law. The Secretary must make an inquiry into the *nature of the services*, not just into what they are called or who provides them.

III. ***Conclusion***

In summary, we conclude that, while the district court lacked jurisdiction to order the Secretary to release the funds withheld because of the disallowance decision, the court properly determined that the special education exclusion exceeded statutory authority and vacated the decision of the Grant Appeals Board. Nevertheless, we cannot rule that the services in question here are reimbursable "medical assistance" because we have no evidentiary basis for doing so. All we can do is order the Secretary to develop a Medicaid audit procedure that looks behind the state statutory label "special education" to determine whether services are reimbursable.

Accordingly, so much of the district court's decision that constitutes a declaratory judgment that the Secretary's blanket special education exclusion is in excess of statutory authority is *affirmed*. The money judgment against the Secretary is *vacated*.

Affirmed in part, vacated in part and remanded for action consistent with this opinion. Each party to bear its own costs.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-2523-G

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF,

v.

MARGARET HECKLER ET AL., DEFENDANTS.

Aug. 27, 1985

MEMORANDUM AND ORDERS ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

GARRITY, District Judge.

In this action, the Commonwealth of Massachusetts ("Commonwealth") seeks review of a May 31, 1983 decision of the Department Grant Appeals Board ("the Board") of the Health Care Financing Administration ("HCFA") of the Department of Health and Human Services ("HHS"), which held that certain services provided to persons residing in state-owned intermediate care facilities for the mentally retarded ("ICF/MRs") were not eligible for reimbursement under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq*. ("the Medicaid program"). The Board disallowed $6,414,964 in federal financial participation ("FFP") advanced to the Commonwealth between July 1, 1978 and December 31, 1980, claiming that those costs were incurred by the Commonwealth in providing educational services and were therefore not reimbursable under the Medicaid program. The Common-

wealth contests this decision, claiming that the services in question are reimbursable under Medicaid. Jurisdiction is based on 28 U.S.C. § 1331. The parties have filed cross-motions for summary judgment. After hearing oral argument and considering the briefs and administrative record,[1] the court grants the Commonwealth's motion for summary judgment and denies defendant's motion.

I. *Relevant Statutory and Regulatory Background*

The Medicaid program, created in 1965, is designed to assist states in providing "(1) medical assistance on behalf of families with dependent children and of aged, blind, and disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care." 42 U.S.C. § 1396. Under the Medicaid program, such services are financed in part by federal grants to participating states which have submitted, and had approved by the Secretary of HHS, state plans for medical assistance. *Id.* The federal government pays a certain percentage of the total cost of Medicaid services, and the balance is paid by the state. 42 U.S.C. § 1396b(a).[2]

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[1] Included in the administrative record ("A.R.") is a video tape exhibit submitted by the Commonwealth which depicts the services provided to a sample of individuals who reside in Belchertown State Hospital, an ICF/MR. The court viewed the entire video tape, which is forty-five minutes in length, in chambers, having borrowed a television and video cassette recorder from the Probation Office of the court.

[2] Federal Medicaid grants are awarded to each participating state prospectively, based on an estimate provided by the state each quarter year. 42 U.S.C. § 1396b(d). Following each quarter, the state submits a report of its actual expenditures and the next quarter's grant is adjusted accordingly. The HCFA reviews state reports of expenditures and may disallow FFP when it determines that an expenditure is not reimbursable under the Medicaid program. Administrative review of a disallowance is available in the form of a request for reconsideration by the Board. 42 U.S.C. § 1316(d). Decisions of the Board are then reviewable in a United States District Court.

In 1971, Congress included in the Medicaid program "intermediate care facility services." 42 U.S.C. § 1396d(a)(15). An ICF is defined as

> an institution which is (1) licensed under state law to provide, on a regular basis, health-related care and services to individuals who do not require the degree of care and treatment which a hospital or skilled nursing facility is designed to provide, but who because of their mental or physical condition require care and service (above the level of room and board) which can be made available to them only through institutional facilities, (2) meets such standards prescribed by the Secretary as he finds appropriate for the proper provision of such care, and (3) meets such standards of safety and sanitation as are established under regulation of the Secretary in addition to those applicable to nursing facilities under State law. . . .

42 U.S.C. § 1396d(c). 42 U.S.C. § 1396d(d) provides the following:

> (d) Intermediate care facility services
>
> The term "intermediate care facility services" may include services in a public institution (or distinct part thereof) for the mentally retarded or persons with related conditions if–
>
> (1) the primary purpose of such institution (or distinct part thereof) is to provide health or rehabilitative services for mentally retarded in-

dividuals and which meet such standards as may be prescribed by the Secretary;

(2) the mentally retarded individual with respect to whom a request for payment is made under a plan approved under this subchapter is receiving active treatment under such a program; and

(3) the State or political subdivision responsible for the operation of such institution has agreed that the non-Federal expenditures in any calendar quarter prior to January 1, 1975, with respect to services furnished to patients in such institution (or distinct part thereof) in the State will not, because of payments made under this subchapter, be reduced below the average amount expended for such services in such institution in the four quarters immediately preceding the quarter in which the State in which such institution is located elected to make such services available under its plan approved under this subchapter.

Under the Social Security Act, the Secretary of HHS is authorized to promulgate rules and regulations, not inconsistent with the Act, as are necessary to the efficient administration of her functions under the Act. 42 U.S.C. § 1302. Pursuant to this authority, the Secretary promulgated 42 C.F.R. § 441.13(b), which provides the following:

> Payments to institutions for the mentally retarded or persons with related conditions and to psychiatric facilities or programs providing inpatient psychiatric services to individuals under age 21 may not include reimbursement for vocational training and educational activities.

II. *State Background*

The Commonwealth has participated in the Medicaid program since 1966. The Massachusetts Department of Public Welfare is responsible for administering the

Massachusetts plan. The Massachusetts Department of Mental Health ("DMH") operates the state-owned ICF/MRs certified to participate in the Medicaid program. As an ICF/MR operator, the DMH is responsible for complying with the statutory and regulatory requirements of ICF/MRs under the Medicaid program. In particular, the DMH must ensure that all mentally retarded individuals residing in ICF/MRs are receiving active treatment, in accordance with 42 U.S.C. § 1396d(d)(2). Under the Secretary's regulations, "active treatment" requires among other things that these individuals regularly participate in "professionally developed and supervised activities, experiences or therapies" and that each individual receive an "individual written plan of care", known as an "ISP" (Individual Service Plan), which sets forth measurable goals or objectives and an integrated program of activities or therapies designed to achieve those goals. 45 C.F.R. § 435.1009. According to the regulation, "[t]he overall purpose of the plan is to help the individual function at the greatest physical, intellectual, social, or vocational level he can presently or potentially achieve." 42 C.F.R. § 435.1009(b).

Pursuant to state law, the Commonwealth is also required to provide special education to all school age children with special needs in Massachusetts. Chapter 766 of the Acts of 1972, M.G.L. c. 71B ("Chapter 766"). Special education is defined as "everything which is required to be provided to a child in need of special education pursuant to the IEP." Chapter 766 Regulations, 122.0. The IEP (Individual Education Plan), which is prepared for each Massachusetts child with special needs, describes the child's educational abilities and goals and sets forth methodologies and teaching approaches designed to meet these goals. *See* Chapter 766 Regulations, § 322.0.

Section 12 of Chapter 766 requires that the Department of Education ("DOE") establish and maintain a school department for school-age children in each ICF/MR and provide services jointly with the DMH. M.G.L. c. 71B, § 12. The director and staff of such school departments are employees of the DOE, which is responsible for the costs of all aspects of the educational programs in the ICF/MRs. *Id.* The Bureau of Institutional Schools ("BIS") of the Division of Special Education of the DOE is responsible for administering the educational programs at ICF/MRs, pursuant to Chapter 766. Chapter 766 Regulations, § 700.0.

The Commonwealth, in an effort to comply with both state and federal law concerning the treatment of the mentally retarded at ICF/MRs and to promote efficiency, has consolidated the administration of the services provided by the DMH pursuant to the "active treatment" requirement of Medicaid and the services provided by the BIS pursuant to Chapter 766. Each individual residing in an ICF/MR who is required to have an annual ISP developed in accordance with the Medicaid regulations and an annual IEP developed in accordance with Chapter 766, is evaluated annually through a "Joint Review Process", in which DMH and BIS staff develop a joint plan meeting the requirements of federal and state law. The DMH then delegates the services required in each individual's plan to the appropriate professional groups. The Commonwealth also utilizes a "Transdisciplinary Approach" in its staffing. This approach encourages "role release" by different professionals, or the sharing of one's expertise with others of different professions, in order to consolidate the staff and to ensure continuity and consistency in the delivery of services to these individuals.

Concerned that in providing the services to individuals at ICF/MRs there would be difficulty distinguishing between payments for services which are reimbursable under

the Medicaid program and those which are not, the Commonwealth sought clarification from the regional Medicaid office of HHS and received an interpretative bulletin, Action Transmittal HCFA-AT-78-104 ("the Action Transmittal") in response (attached as Appendix 1). The Action Transmittal, dated November 29, 1978, was issued by HHS in an effort to clarify the relationship between the Medicaid program and the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1400 *et seq.* ("EAHCA") with respect to services provided to individuals residing at ICF/MRs. Briefly, EAHCA requires that in order to qualify for federal education assistance under the statute, the state must assure all handicapped children the right to a free appropriate public education. 20 U.S.C. § 1412(1).[3] Free appropriate public education consists of "special education" and "related services". 20 U.S.C. § 1401(18). The term spcial education is defined as

> specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction and instruction in hospitals and institutions.

20 U.S.C. § 1401(16). The term related services is defined as

> transportation, and such developmental, corrective and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical counseling services except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handi-

[3] Chapter 766, which was enacted three years before the federal statute, provides such assurance in Massachusetts.

capped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

20 U.S.C. § 1401(17). EACHA [*sic*] allows for federal funding for related services in they are provided by the state to individuals free of charge. 34 C.F.R. § 300.14(a)(2)

The Action Transmittal acknowledges that in providing services to individuals at ICF/MRs, "it is difficult to clearly differentiate between a habilitative . . . and an educational service." In a letter accompanying the transmittal, an attorney for HCFA states that while academic education (reading, writing, etc.) and vocational training are not eligible for FFP under the Medicaid program, "training in 'the activities of daily living' (such as dressing and feeding oneself) are both required and reimbursable under Title XIX." However, according to the Action Transmittal, some services may constitute both habilitative services under Medicaid and related services under EACHA [*sic*]. Therefore, it states that these habilitative services may be reimbursable under Medicaid even though they are also considered to be related services in an individual's IEP. Furthermore, states may develop "consolidated" IEPs and ISPs for individuals whose Medicaid and educational services overlap. However, the transmittal also states that "[i]f [the] state statute extends responsibility for payment of specific health services to the education agency, then the Medicaid Agency cannot pay for those services." Finally, the Action Transmittal explained that the purpose of 42 C.F.R. § 441.13 in excluding education and vocational activities from Medicaid coverage was "to assure non-duplication of federal funds."[4]

[4] Defendants now reject non-duplication of funding as the purpose behind the regulation.

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The Commonwealth determined that all of the services rendered by the DMH and BIS to individuals at the ICF/MRs were eligible for reimbursement under Title XIX. The Secretary, however, disallowed all costs incurred by the BIS in providing services at ICF/MRs as non-reimbursable education services. Specifically, the following BIS costs were disallowed:

1. Activities funded under Title I of the Elementary and Secondary Education Act, P.L. 89-10;[5]
2. Service delivery contracts with educational collaboratives and one regional vocational school entered into by the BIS to provide specific services required by Chapter 766 regulations which could not be provided by existing state personnel;
3. Contracts for personnel to perform evaluation and monitoring functions required by Chapter 766; and
4. State-salaried personnel of the Department of Education, including institution school teachers and instructional aides, who, as required by Chapter 766, service ICF/MR residents in accordance with documented goals stated in IEPs.

III. *Findings and Conclusions*[6]

We hold that the services provided by the BIS in ICF/MRs are eligible for reimbursement under the Medi-

[5] Prior to the issuance of the HCFA disallowance notice, the Commonwealth agreed to reduce from its claim for reimbursement those costs for which it had received reimbursement already under Title I. According to defendants these costs amounted to $67,800, of which the federal share was $35,090. Therefore the disallowance in category 1 above is not disputed by the Commonwealth.

[6] This case presents questions of both fact and law. Findings of fact of the Board are reviewable by this court under the "substantial evidence" standard. *State of Minnesota v. Heckler*, 8 Cir. 1983, 718 F.2d 852, 860. Questions of law are to be resolved by the court. *Id.*

caid program. The types of services provided by the BIS to these mentally retarded individuals fall clearly within the category of habilitative services explicitly covered by Title XIX. 42 U.S.C. § 1396.

In making this decision, the court relies to a great extent on the video tape described in footnote 1 *ante* and on the case study of Client "B" described in the Commonwealth's memorandum in support of its motion for summary judgment. Client "B" is profoundly retarded, as well as severely physically handicapped. Because B has extreme difficulty in interacting with his environment, i.e., he is virtually unable to respond to visual or auditory activity, his ISP and IEP goals as of 1980 largely involved the stimulation of B's senses to increase his awareness of his surroundings. B's curriculum at his day program, which was located outside his ICF/MR and was staffed by the BIS, included learning to signal for food when he was ready to eat to prevent aspiration of food into his lungs by controlling the speed at which he was fed; attending auditory stimulation for two minutes; locating hidden objects; showing preference for certain objects presented; and encouraging social interactions with adults.[7]

The video tape depicts nine Belchertown State School residents performing various exercise under the supervision of BIS staff.[8] For example, these exercises include training different individuals to respond to visual stimuli, to turn on a radio with an adaptive switch, to remember the letters in one's name, to ask for a drink by reaching out with a cup, to eat with a spoon, and to sort out objects.

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[7] The Secretary suggests that Client "B" is not representative of the individuals who receive services from the BIS because he was the most severely handicapped of all the individuals whose cases were audited by HHS. However, she does not dispute the fact that she disallowed the service provided to B as "educational", a position we find untenable.

[8] The court was aided in understanding these exercises by the testimony of Linda Brown before the Board on March 17, 1983 (A.R. 1278-1315).

We hold that these services, which we believe are representative of the services generally provided by BIS staff, are covered by the Medicaid program.

The purpose of Medicaid is to provide medical assistance to eligible individuals *as well as* "rehabilitation and other services to help . . . such individuals attain . . . capability for independence or self-care." 42 U.S.C. § 1396. Medicaid coverage is not limited to purely medical assistance, but was " 'designed to alleviate the cost of health care which is active and remedial rather than custodial in nature.' " *State of Minnesota v. Heckler*, 8 Cir.1983, 718 F.2d 852, 864 (citing *Legion v. Richardson*, S.D.N.Y., 354 F.Supp. 456, 459, *aff'd sub nom. Legion v. Weinberger*, 414 U.S. 1058, 94 S.Ct. 564, 38 L.Ed.2d 465 (1973)).

ICF/MRs were included in the Medicaid program in 1971 for that same purpose, viz., to provide "health or rehabilitative services for mentally retarded individuals." 42 U.S.C. § 1396d(d)(1). By this amendment to the Medicaid statute, Congress sought to remove the mentally retarded from mental hospitals and skilled nursing homes, where the services are largely custodial, to institutions in which the primary objective is the provision of health and rehabilitative services to enable these individuals to achieve some degree of self-care. *See* Report of Senate Finance Committee printed in Statement of Sen. Long, 117 Cong.Rec. 44721 (1971). As stated by Senator Bellman:

> Mental retardation is not, in most instances, a condition which responds to treatment. However, there are public institutions whose primary objective is the active provision of rehabilitative, educational and training services to enhance the capacity of mentally retarded individuals to care for themselves or to engage in employment. Public institutions whose primary objective is the provision of health services or

> rehabilitative services to the mentally retarded should be subject to Federal participation under adequate safeguards.

117 Cong.Rec. 44720 (1971). Therefore, within the Medicaid statute and its legislative history we find clear Congressional intent to provide Medicaid coverage for the types of habilitative services provided by the BIS.[9]

The Board concurred in the decision of HHS that these BIS costs were incurred for "educational activities" within the meaning of 42 C.F.R. § 441.13(b). The basis for this decision is essentially that these services were provided by the Commonwealth pursuant to Chapter 766 through the DOE in accordance with each individual's IEP.

Regulations section 441.13(b) is consistent with the purpose of the Medicaid program. Medicaid was not designed to cover traditional educational services;[10] rather, as stated *ante*, its purpose is to provide those treatments, therapies, and other programs necessary to enable disabled individuals to gain some degree of independence in performing "the activities of daily living." In our opinion,

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[9] We do not agree with the Commonwealth that all services provided pursuant to the "active treatment" requirement of 42 U.S.C. § 1396d(d)(2) and 42 C.F.R. § 435.1009 are reimbursable under Medicaid. The active treatment language of the statute demands that residents at ICF/MRs participate in regular programs and therapies. The purpose of this requirement is to avoid coverage for purely custodial services. In our opinion, active treatment is a condition placed on ICF/MRs under the Medicaid statute. However, we find that the "health and rehabilitative services" language of § 1396d(d)(2) describes the types of services covered by the Medicaid program.

[10] Federal education assistance is provided to the states through Title I of the Elementary and Secondary Education Act of 1965, P.L. 89-10; the Elementary and Secondary Education Amendments of 1969, P.L. 91-230; and the Education for All Handicapped Children Act of 1975, P.L. 94-142.

section 441.13(b) was inappropriately applied in this case. In particular HHS defined "education" by reference to state and federal education statutes and to the Commonwealth's method of administering the services in question, rather than to the nature of the services themselves. This approach errs on the side of administrative convenience at the expense of compliance with the Medicaid statute in our view.

Section 441.13(b) does not define "educational activities." The services provided by the BIS, involving for the most part therapies designed to train the mentally retarded to function at some minimal level in society, cannot be defined as "traditional" or "academic" education, which clearly would be excluded under the regulation. Yet these Medicaid covered services could perhaps be described as "special education" or "related services" as defined by Chapter 766 or EACHA [*sic*]. *See Abrahamson v. Hershman,* 1 Cir.1983, 701 F.2d 223, 228. On that basis, HHS would have them excluded from Medicaid coverage under section 441.13(b).

However, section 441.13 does not state that the costs of all services which are provided pursuant to a state education statute and paid for by the state are not reimbursable under the Medicaid program; rather, it states only that the costs of "educational activities" are not reimbursable. The Massachusetts and federal education statutes define special education extremely broadly. *See Abrahamson, supra*. But the fact that these services might be classified as "education", "special education" or "related services" under other statutes, particularly a state statute, is not dispositive of the classification of these services for the purposes of the Medicaid statute nor the regulations promulgated thereunder. "[A] word used in one statute does not necessarily have the same meaning in another statute." *Complaint of Tracey,* D.Mass.1985, 608 F.Supp. 263, 268. Education is normally more narrowly defined. It

connotes a more traditional, academic discipline. All training or instruction is not education in our view. The simple skills being taught to the individuals at these institutions, particularly those shown on the videotape and being taught to Client "B", are certainly not educational in the traditional sense of the word.[11]

Furthermore the court has found *ante* that these services are covered by the Medicaid program because they are habilitative in nature.[12] Section 441.13(b) may not be used by HHS to take out of the coverage of Medicaid those services explicitly covered by the statute. Therefore, we reject the position of HHS that Medicaid coverage is not available for services covered by state education statutes.

The fact that these services are provided by an agency of the Commonwealth's education department does not bar their classification as Medicaid covered habilitative services. As explained by the Commonwealth, each individual in an ICF/MR is evaluated annually by DMH and BIS staff together and is given a joint plan of care, which includes his or her ISP and IEP. In fact, many of the services required under these individuals' ISPs and IEPs are similar or identical, which is understandable in light of 45 C.F.R. § 435.1009, which states that the overall purpose of the ISP is to help the individual function "at the greatest physical, intellectual, social, or vocational level he can presently or potentially achieve." Under its Transdis-

[11] The Commonwealth claims that the services in question do not constitute "education" because they do not aid these individuals in progressing from one "cognitive" level to another (Commonwealth's brief, p. 37). That analysis may be a more technical way to characterize what we have described in lay terms.

[12] We agree with the Commonwealth that many of the services described in the videotape and in the Commonwealth's brief seem to be designed to aid these individuals in overcoming their health-related disabilities and therefore could be categorized as health services.

ciplinary Approach, the programs and therapies required by these plans are provided by both DMH and BIS staff in an integrated fashion. This technique employed by the Commonwealth was specifically endorsed by HHS in its Action Transmittal. Given this Transdisciplinary Approach, HHS's decision to disallow all services provided by the BIS pursuant to IEPs, while allowing similar services provided by the DMH pursuant to ISPs, is arbitrary in our opinion and is also not supported by substantial evidence.

Finally, we find that the Commonwealth was justified in seeking FFP for the costs incurred by the BIS under categories 2, 3 and 4 listed on pages nine of this opinion. All of the costs listed in these categories were expended by the Commonwealth in administering the programs and providing the services to ICF/MR residents which we have held are covered by the Medicaid program.

Conclusion

The Commonwealth is entitled to FFP under the Medicaid program for the costs incurred by the BIS at ICF/MRs. Therefore, the Commonwealth's motion for summary judgment is granted and defendants' cross-motion for summary judgment is denied.[13]

[13] Counsel shall endeavor to stipulate and file a form of judgment consistent herewith as soon as practicable.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-2523-G

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF,

v.

MARGARET HECKLER, ET AL., DEFENDANTS.

JUDGMENT

For the reasons set forth in this Court's August 27, 1985 Memorandum and Order, it is hereby ordered and adjudged that the decision of the Department Grant Appeals Board of the United States Department of Health and Human Services in Decision No. 438 (May 31, 1983) which disallowed reimbursement to the Commonwealth of Massachusetts the sum of $6,414,964 in federal financial participation under the Medicaid program, 42 U.S.C. §§ 1396 *et seq.*, is reversed.

Dated this 7th day of October, 1985.

By the Court,

/s/ W. ARTHUR GARRITY, JR.
U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 85-2337-G

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF,

v.

MARGARET HECKLER, ET AL., DEFENDANTS.

November 25, 1985

MEMORANDUM AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

GARRITY, J.

This action has been filed as a related case, as it presents the same legal and factual questions as those at issue in *Commonwealth of Massachusetts v. Heckler et al.*, Civil Action No. 83-2523-G. The court entered its memorandum and orders on cross-motions for summary judgment in that case on August 27, 1985. On the following day, the court entered an order in the instant action directing defendants to file any opposition, with an explanatory memorandum, to the same result in this case. Defendants' response to the court's order proposed that the case be decided on cross-motions for summary judgment based on the briefs filed in the 1983 case and on the administrative record in this case. As grounds for this procedure, defendants cited the similarity of the two cases and the fact that the court's reasoning in the 1983 case would seem to apply equally here. The court adopted the procedure suggested by defendants which resulted in the cross-motions for

summary judgment which are now before this court. After consideration of the briefs and the administrative record, the court grants plaintiff's motion for summary judgment and denies defendants' motion.

Defendants concede that the factual and legal issues in the instant action are "substantially identical" to those already litigated in the 1983 case and ruled on by this court. In the court's opinion, the only differences between the two cases are the time period during which the Commonwealth provided the services at issue and the amount of federal financial participation which the Commonwealth asserts it is entitled to under the Medical Assistance Program (Medicaid) of the Social Security Act, 42 U.S.C. § 1396 *et seq*. While the court afforded defendants an opportunity to persuade the court that its ruling in the 1983 case should not govern the present action, neither defendants' response to the the August 28, 1985, order nor its present motion and supporting papers explain why a result different from that reached in the 1983 case is warranted here.

In this action, the Commonwealth seeks review of a March 29, 1985 decision of the Department Grant Appeals Board of the Health Care Financing Administration of the Department of Health and Human Services. The Board disallowed $4,908,994 in federal financial participation advanced to the Commonwealth from January 1, 1981 to June 30, 1982 on the ground that those costs were incurred in providing educational services and were therefore not reimbursable under the Medicaid progam. However, the Board stated in its decision that the activities provided by the Commonwealth of Massachusetts from January 1, 1981 through June 30, 1982 are indistinguishable from previously disallowed activities provided by the Department of Education from July 1978 through December 1980. Those previously disallowed activities were found by the court to be the types of services that fall clearly within

the category of habilitative services explicitly covered by Title XIX. 42 U.S.C. § 1396. Furthermore, the Board disallowed the present claim on substantially the same grounds as the previous claim at issue in the 1983 case. Thus, the reasons for the court's decision in the 1983 case holding that the services at issue there were eligible for reimbursement under the Medicaid program, apply with equal force to the essentially identical factual and legal questions at issue in the instant action.

In granting plaintiff's motion for summary judgment and denying defendants' motion, the court relies on the findings of fact and conclusions of law in its order of August 27, 1983 in the related case of *Commonwealth of Massachusetts v. Heckler et al.*, Civil Action No. 83-2523-G. Defendants have failed to make any showing that the instant action is distinguishable from the 1983 case on either factual or legal grounds. The briefs on which the parties rely and the administrative record compel the conclusion that there are no genuine issues of material fact and that plaintiff is entitled to a judgment as a matter of law.

/s/ W. Arthur Garrity, Jr.
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 85-2337-G

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF

v.

MARGARET HECKLER, DEFENDANT

JUDGMENT

GARRITY, J.

In accordance with the court's "Memorandum and Order on Cross-Motions for Summary Judgment" filed on November 25, 1985, it is ORDERED:

that summary judgment for plaintiff against defendant be, and it is hereby, entered.

By the Court:

/s/ STEPHEN A. MOYNAHAN, JR.
Stephen A. Moynahan, Jr.
Deputy Clerk

Dated: December 2, 1985

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-2523-G

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF,

v.

MARGARET HECKLER, ET AL., DEFENDANTS.

November 8, 1983

PROCEDURAL ORDER

GARRITY, J.

In the above-entitled action, defendant filed an answer to the complaint on October 28, 1983 asserting several affirmative defenses. The court will treat the second defense (lack of subject matter jurisdiction) and third defense (failure to state a claim upon which relief can be granted) as constructive motions to dismiss. Defendant shall file by Monday, December 5, 1983, a memorandum of law in support of its constructive motions. Plaintiffs shall reply by Monday, December 19, 1983. If materials outside the pleadings are submitted, the court will consider the motions under Fed. R. Civ. P. 12(b) and 56.

/s/ GARRITY J.
United States District Judge

ORDER

1/11/84

In light of parties' memoranda, both defenses are ordered denied. In our opinion, we do have subject matter jurisdiction. Denial of the third defense is without prejudice to later motions for summary judgment.

/s/ GARRITY, J.

APPENDIX G

DEPARTMENT OF HEALTH AND HUMAN SERVICES

DEPARTMENTAL GRANT APPEALS BOARD

SUBJECT: Massachusetts Department of Public Welfare
Docket No. 84-199
Decision No. 638

DATE: March 29, 1985

DECISION

The Massachusetts Department of Public Welfare appealed a determination by the Health Care Financing Administration (HCFA or Agency) disallowing $4,908,994 in federal financial participation (FFP) claimed under title XIX (Medicaid) of the Social Security Act. The disallowed costs were for day school programs provided by the State Department of Education to residents of eight State-owned intermediate care facilities for the mentally retarded (ICF/MRs). The activities were provided from January 1, 1981 through June 30, 1982 and are indistinguishable from previously disallowed activities provided by the Department of Education from July, 1978 through December, 1980. State's brief, pp. 15, 32-33; Agency's brief, p. 2. The Board upheld the disallowance of the earlier activities in Decision No. 438, Massachusetts Department of Public Welfare, May 31, 1983.[1]

The Agency disallowed the present claim on the same grounds as the earlier one, concluding that program regulations preclude reimbursement since they expressly

[1] Board Decision No. 438 is currently under review in the U.S. District Court for the District of Massachusetts. D. Mass. No. 83-2523-G.

bar payment for "vocational training and educational activities" for individuals in ICF/MRs. 42 CFR 441.13(b). The Agency also cited a policy action transmittal implementing the regulation, HCFA Action Transmittal 78-104 (AT-78-104) dated November 29, 1978. The Agency concluded that descriptions of educational activities and contrasting descriptions of reimbursable activities in the transmittal further supported its position.

For the reasons discussed below and in our previous decision, we agree with the Agency that costs of the school programs may not be reimbursed under the Medicaid program. Accordingly, we uphold the disallowance.

The State in its brief identified four issues presented by this appeal.[2] We summarize those issues as follows:

1) Whether 42 CFR 441.13(b) bars reimbursement only of educational activities that have already been reimbursed under federal education programs for the handicapped;

2) Whether the activities at issue are reimbursable under standards set out in AT-78-104;

3) Whether the activities are reimbursable if they constitute "active treatment" as defined by the Medicaid program; and

4) Whether the State's good faith reliance on applicable portions of AT-78-104 precludes the disallowance of these costs.

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[2] The State raised several additional issues in its earlier appeal. Since those arguments were previously unavailing to the State, and the State did not even raise them here, we do not address them. We note, however, that, in order to clarify the nature of services and the factual basis of the case, the State did "incorporate by reference" the entire administrative record in Board Decision No. 438, including a videotape, which we do consider in reaching our decision here.

1. *The Regulation*

Medicaid regulations expressly prohibit any payment under the program to institutions for the mentally retarded for "vocational training and education activities." 42 CFR 441.13(b). We conclude and, indeed, the State did not even deny that the activities in question come within the plain or common sense meaning of the term "educational activities" for residents of institutions for the mentally retarded. The activities consisted of day school programs staffed by special education teachers and provided to school age residents of the ICF/MRs by the State Department of Education. Many of the activities were even provided outside the institutions in educational collaboratives or in other settings. All of the activities are specifically required under Massachusetts law and regulations relating to educating children with special needs. (State law requirements are discussed in greater detail on pages 7-8 below.)

The only argument the State made based on the regulation itself is that the bar on payment precluded funding only for activities that had already been reimbursed from some other federal source. In other words, the State here seems to be arguing that the regulation does not bar funding generally but permits the State to select which federal program would be more advantageous to it in funding the activities. The fundamental difficulty with this argument is that there is nothing in the language of the regulation to support the position and indeed the State does not even point to language that allegedly might. The State instead refers to the fact that it has returned to the Agency $404,305 of FFP in Medicaid for activities that were already reimbursed under another federal program. The State, however, can not use its repayment, an action fully within its control, as an authority for limiting the scope and effect of a reimbursement rule in the regulations.

Moreover, as we indicated in Decision No. 438, even if there were no funding bar in the regulations, it is questionable whether there is authority in the Medicaid statute for the general reimbursement of educational activities in ICF/MRs. Medicaid is designed specifically to provide medical, not educational, assistance. See section 1901 of the Act. The statute itself does not provide any authority for funding educational activities as such. On the other hand, the Congress has enacted other federal statutes to provide federal assistance for educational programs for the mentally retarded administered by state educational agencies. *See* statutes cited on page 7 of Decision No. 438.

The absence of any direct reference to funding for "educational activities" in the Medicaid statute, therefore, is evidence of the lack of Congressional intent to fund the activities. Indeed, the general bar on funding of educational activities has been in program regulations well before the activities in question were provided and has never been overridden by Congress through statutory amendment.[3]

Finally, while the Agency in AT-78-104 (see section 2 below) discussed the purpose of the regulatory bar in terms of assuring "non-duplication of federal funds," Appendix B, p. 2, the action transmittal at no point implied, as the State here would argue, that "educational" activities could be reimbursed under Medicaid simply if the State had not claimed and received funding for those activities under any other federal program. The Agency could "assure non-duplication" either by prohibiting funding for activities actually funded through another federal program, or by prohibiting funding for "special education"

[3] In decision No. 438 (pages 9-11) and in Oklahoma Department of Human Services, Decision No. 367, December 17, 1982 (pages 5-9), we considered other issues of legislative intent which also supported the conclusion that barring funding for educational activities is consistent with Congressional intent.

activities potentially covered by another program. The regulation takes the latter approach.

We would also note that the Agency has identified other purposes for the bar on funding for educational activities. In discussing an earlier version of the same regulatory bar on funding for educational activities, the predecessor to the Agency stated that the activities were not "medical care cost (services) as defined under title XIX and are assumed to be financed by other Federal agencies or to be a traditional service of the State for all appropriate population groups." Medical Services Administration Program Regulation Guide No. 33 (PRG-33), September 30, 1974, Question 7, p. 4.

Accordingly, we conclude that the regulatory bar on funding applies to the activities in question and precludes reimbursement for them under the Medicaid program.

2. *HCFA Action Transmittal 78-104*

On November 29, 1978 the Agency released an action transmittal (AT-78-104) which discussed the relationship between recently enacted education laws and rules concerning educational and habilitative activities in the Medicaid program. The State here argued that AT-78-104 permitted reimbursement of special education or related services under the Medicaid program as habilitative activities. The State did not argue that all of the activities here were outside the definition of educational activities under the action transmittal criteria. Nevertheless, it implied that all should be reimbursed because the action transmittal recognized flexibility in funding certain habilitative activities and because, even if the activities were educational, they still might fall within the conceptual umbrella of the statutory term "active treatment."

In Decision No. 438 (pages 13-16) and in Decision No. 367 (pages 9-18), we discussed at length the effect of AT-78-104 on the regulatory funding bar for educational

activities. Although AT-78-104 contains language about providing flexibility to states in deciding what funding sources apply, that language is used within the limited context of services which are reimbursable as habilitative under Medicaid (in accordance with 42 CFR Part 442, Subpart G) and also qualify as "related services" under the Education for All Handicapped Children Act and the implementing regulations. It is within this very limited context that certain funding choices may be made. However, the action transmittal also indicates that even these limited choices may not exist where related services are provided by the State educational agency free of charge to all children as part of "special education." *See,* 45 CFR 121a.14(a)(2) now recodified as 34 CFR 300.14(a)(2). Ultimately, then, the action transmittal distinguishes between services that may clearly be identified as a Medicaid habilitative responsibility (fundable) or an educational responsibility (nonfundable) *and* "related" activities that because of their nature may be reimbursed under other programs or Medicaid "*depending on careful assessment of Federal requirements and State and local factors.*" (Emphasis supplied) AT-78-104, p. 6.

In giving an example of an activity that usually falls in the purely educational category, the action transmittal cites "educational services provided in a traditional classroom setting by trained special educators." *Id.* First and foremost, the State here has not demonstrated that any of the services at issue fall outside the scope of this example. Many of the services are provided in educational collaboratives or other settings outside the institutions. The remaining services are still provided within some form of school program setting within the institution.

The record here, including a videotape prepared by the State for its earlier appeal, demonstrates that the programs were designed to take into account the needs of children within a broad range of abilities. However, the

fact that the programs were designed to be responsive to particular learning needs of individuals, or the fact that the programs may not resemble methods of education for nonhandicapped children is not a basis for concluding the activities are not educational activities. This term must be interpreted in the context of a regulation addressing activities for retarded persons requiring institutionalization. Moreover, in using the adjective "traditional," we think the Agency was attempting to convey something of the scale, scope, and source of the program. We do not think that the Agency was attempting to bar activities solely because they might use a particular educational methodology. In sum, then, we think that the action transmittal's characterization of educational activities fully supports the Agency's position that the claim here would not be reimbursable.[4]

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[4] The State also cited an Agency interpretation of educational activities based on an earlier version of the educational activities regulation in a program regulation guide. This interpretation referred to educational activities as "formalized classroom programs." MSA-PRG-33, September 30, 1974, question 8. Although the State admittedly had not relied on this interpretation since it only recently came to its attention, the State identified the interpretation as a more contemporaneous one to the underlying rule than the action transmittal's. Clearly, however, based on all the evidence in the record in this appeal, the activities in question are part of a "formalized" classroom setting. The discussion above fully demonstrates this. Moreover, as the Agency argued, the program guide uses the terms "formalized classroom setting" to contrast educational activities with toilet training, feeding, dressing etc. provided to patients by the staff of the institution *or* with camps or farms maintained by the facility for recreation or physical rehabilitation. Here there is no allegation of the latter and the Agency has allowed costs of training and services in activities of daily living provided by the ICF/MR staff (State Department of Mental Health). Moreover, AT-78-104 explains in greater detail the effect of later-enacted "special education" programs on the "educational activities" regulation and, to the extent it conflicts with MSA-PRG-33 (which it here does not), it can be said to supersede it.

Moreover, as we discussed in detail in Decision No. 438 (pages 13-16), Massachusetts statutory and regulatory standards extend responsibility for "related services" to the State education agency as part of its definition of "special education." Thus, even for those limited services where flexibility might exist under the Agency action transmittal, State statute and regulations preclude the exercise of discretion here.[5] The Board's conclusions concerning State law in Decision No. 438 were based on the plain meaning of the State statute and regulations. The same statute and regulations have remained in effect for the period of the current disallowance.[6] Although the State made two

[5] In discussing what its law provided, Massachusetts completely misconstrues the Agency's reference to the action transmittal standard in the disallowance and the Board's interpretation of AT-78-104 in Decision No. 438. The State implied that the proper standard under the action transmittal was whether State statute and regulations require the State to bear the "sole financial responsibility" for the services—presumably to the exclusion of any federal source including Medicaid and education programs. There is no basis whatsoever in the language of the action transmittal for such a standard, however, nor is there any basis in the Medicaid statute or regulations. Further, the program purpose of such a standard would be very difficult to decipher. The State here did not clarify why a regulatory bar for funding of educational activities under Medicaid should go into effect only where the State had already expressly assumed sole financial responsibility for the activities. Finally, although the action transmittal states that Medicaid funding is precluded "[i]f State statute extends responsibility for payment of specific health services to the education agency" or for "health or supportive services available without charge to all children," we do not need to reach the issue here of whether this creates a rule excluding Medicaid funding even in some circumstances where no federal funding elsewhere is potentially available. Here, all of the services are clearly *special education* under State standards, and thus apparently would be fundable under federal education programs.

[6] The Massachusetts law, commonly referred to as "Chapter 766," provides under section I:

> In light of the policy of the Commonwealth to provide an adequate publicly-supported education to every child resident

arguments to refute the Board's conclusions, neither was based on interpretations of the actual language of the State law and regulations for the period in question. The State instead cited a series of cases (State's brief, pp. 25-26) which it argued supported the position that the State was not the sole financial source for special education activities. These cases, however, are irrelevant to the actual issue raised. They do not address the reimbursement of special education activities under Medicaid and indeed do not focus specifically on the one activity that is potentially reimbursable, related services. If anything, the relevance of these (and cases cited on pages 19-20 of the State's Brief) to the issue here is that they buttress the point that special education is indeed an educational activity by emphasizing that handicapped children have *educational* needs which must be met.

The State also argued that Massachusetts has amended its special education statute to relieve local school committees of the obligation for health care services that are reimbursable by third parties. Mass. G.L. Ch. 71B § 5. This amendment also is irrelevant to this case for several reasons. First, it was not enacted until after the period for which this disallowance was taken. Second, it affects the obligations of the local school committees and does not purport to alter the responsibility of the Department of Education for institutionalized handicapped individuals.

> therein, it is the purpose of this act to provide for a flexible and uniform system of special education program opportunities for all children requiring special education. . . .
> Mass. G.L. Ch. 71B.

Massachusetts Department of Education's Chapter 766 regulations (603 CMR 122) define special education as "everything which is required to be provided to a child in need of special education pursuant to the IEP (Individualized Education Plan] for such child." The activities at issue here are precisely those activities which are provided pursuant to the child's IEP.

Third, it alters responsibilities only for health care services. The Agency did not take a disallowance for any health care services which were provided in the ICF/MR setting by Department of Mental Health doctors, nurses, therapists, and mental health personnel and which would clearly fall within any definition of health care. Agency brief, pp. 5, 9. The State did not show that any of the activities in question here would be encompassed by its amended provision.

Accordingly, we conclude that the activities here fall within the category of educational activities described in the action transmittal. Even if some of the activities might have qualified as "related" services where some flexibility for Medicaid funding might exist under AT-78-104, no funding would be available here since Massachusetts statutes and regulations make such activities part of "special education" for Massachusetts children.

3. *The Active Treatment Requirement*

The State argued as its primary position in the instant appeal that program "active treatment" requirements make all of the subject activities fundable in spite of the regulatory bar.

In defining what type of facility is an ICF for purposes of determining whether the facility provides "covered services" for particular patients, the Medicaid statute includes public institutions for the mentally retarded, if among other things:

> (1) the primary purpose of such institution . . . is to provide health or rehabilitative services for mentally retarded individuals and which meet such standards as may be prescribed by the Secretary;
> (2) the mentally retarded individual with respect to whom a request for payment is made under a plan approved under this title is receiving active treatment under such a program. . . . Section 1905(d) of the Act.

Program regulations require as part of "active treatment":

> [a]n individual written plan of care that sets forth measurable goals or objectives stated in terms of desirable behavior and that prescribes an integrated program of activities, experiences or therapies necessary for the individual to reach those goals or objectives. The overall purpose of the plan is to help the individual function at the greatest physical, intellectual, social or vocational level he can presently or potentially achieve. 42 CFR 435.1009(b).

Without providing a comprehensive subject-matter breakdown of the activities for all of the children involved[7], the State argued that the activities here have as their "primary objectives the stimulation of sensorimotor capabilities and the encouragement of developmental growth." State's brief, p. 22. The State suggested that the activities were structured around a normal school day and that many of the activities were provided in collaboratives or locations away from ICF/MRs because the activities responded to "normalization," the attempt to make the environment of the retarded individual as close to normal as possible. Finally, the State argued that the Agency recognized this functional overlap of active treatment services by permitting a single consolidated plan to enable the State to meet the active treatment requirement.

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[7] Although the State incorporated into the record a videotape providing a limited description of services or activities for a selected group of residents, it never provided the Board with a precise subject-matter breakdown of all of the activities for all the individuals concerned for the period of the disallowance.

The State here completely misconstrues the effect of the active treatment requirement.[8] This provision allows public facilities that otherwise would be outside of the definition of an ICF (and thus unable to have patients for whom services could be reimbursed under the program) to qualify as an ICF for given patients if the facilities provide "active treatment" for those patients according to an individualized plan. The provision, however, in no way guarantees that *every* activity or service that the facility might include in an active treatment plan for a given patient is reimbursable. This is purely a threshhold requirement that must be met before any type of otherwise reimbursable service can be reimbursed. If any activity or service is precluded from reimbursement to begin with, e.g, educational or vocational activities, those services therefore still can not be reimbursed even if included in an individualized plan. Services included in the plan may be non-reimbursable for any number of reasons, not merely because they might be educational or vocational. To the extent that AT-78-104 provides flexibility in consolidating plans to meet the active treatment requirement, it never indicates that consolidation can make a non-reimbursable service reimbursable or that special education activities can be reimbursed if used to meet a facility's active treatment requirement.[9]

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[8] The Board discussed the active treatment requirement at length in Connecticut Department of Income Maintenance, Decision No. 562, August 17, 1984, pp. 1-18. The issue raised there, however, was whether a facility was actually providing active treatment for residents of certain cottages, not whether the State was entitled to funding for educational activities used by a facility to meet the active treatment requirement.

[9] The Agency here noted that the State meets the active treatment requirement in the case of adult residents of ICF/MRs without resort to the subject special education programs provided to children under State education laws. Agency's brief, p. 7. The Agency also noted that active treatment services for children are reimbursed under the program, e.g., the costs of training and services in activities of daily living provided the staff of the institutions (State Department of Mental Health). *Id.* at 5.

The action transmittal identified one type of activity, "related" services, that may be reimbursed under the Medicaid program in spite of any similarity or relationship to educational activities. As we discussed previously, however, none of the activities here qualify for reimbursement under criteria identified by AT-78-104. We also note that the State's argument ignores the fact that if there was no overlap between ICF/MR services and educational activities, there would be no need for the regulation.

Accordingly, we conclude that the activities in question are barred from reimbursement under the regulations and may not be funded even if used to meet active treatment requirements under the program.

4. *Reliance*

The State's final argument was that the costs here were allowable because the State in good faith relied on applicable portions of AT-78-104 and that such reliance should "preclude the Secretary from subsequently disclaiming [those] portions." State's brief, pp. 30-32. The obvious difficulty with this argument is that the action transmittal does *not* support the State's position and consequently is not being disclaimed by the Agency here. The transmittal nowhere implies that services or activities that qualify as "educational" activities are reimbursable under Medicaid. Indeed, as we stated above, the example given by the transmittal of what is an "educational service" fully supports the conclusion that the activities at issue here are "educational." To the extent that the activities might have qualified as "related services," the transmittal also indicates that Medicaid funds may not be used even for

"related services" if State standards make those services part of "special education." The plain meaning of State statute and regulations is that they do.

Conclusion

On the basis of the foregoing reasons, we uphold in full the disallowance of $4,908,994.

Judith A. Ballard

Norval D. (John) Settle

Donald F. Garrett
Presiding Board Member

APPENDIX H

DEPARTMENT OF HEALTH AND HUMAN SERVICES

DEPARTMENTAL GRANT APPEALS BOARD

SUBJECT: Massachusetts Department of Public Welfare
Docket No. 82-169
Decision No. 438

DATE: May 31, 1983

DECISION

The Massachusetts Department of Public Welfare appealed a decision by the Health Care Financing Administration (Agency) disallowing $6,414,964 in federal financial participation (FFP) claimed under title XIX (Medicaid) of the Social Security Act. The bases for the disallowance were that (1) the State had incorrectly claimed reimbursement for the cost of vocational training and educational activities provided to residents of intermediate care facilities for the mentally retarded (ICFs/MR); and (2) the costs also were not allowable because the activities are available free of charge to all children under Massachusetts State law.

For the reasons stated below, we sustain the disallowance.[1]

[1] The record in this appeal consists of the parties' briefs and appeal files, documents submitted by the State prior to the hearing in this matter, the transcript of the hearing, exhibits submitted by the parties during the hearing, and the parties' post-hearing submissions. One of the exhibits submitted by the State was a video tape depicting the services currently provided by the Bureau of Institutional Schools (BIS) to residents of the public ICFs/MR. The video tape was shown during the hearing with the Presiding Board Member present. The other panel members viewed the video tape in Washington, D.C.

I. *Background*

In Massachusetts, Medicaid payments for ICF/MR services are based on prospective per diem rates. The rate paid to each ICF/MR in any given rate year is based on the facility's operating costs for a year two years prior to the rate year plus an inflation factor. The Massachusetts Rate Setting Commission (RC) audits the costs-of-operation reports submitted by the Department of Mental Health (DMH), the State Agency responsible for operating the State-owned ICFs/MR, for the eight ICFs/MR and calculates the per diem rates used under the Medicaid program. Appellant's Appeal File, Tab B, p. 1.

The HHS auditors' review of the RSC audits supporting the fiscal year 1981 per diem rates disclosed that the RSC did not audit $21 million in costs that were added on to the ICFs/MR cost-of-operation reports. The HHS auditors determined that $9.6 million of these "added on" costs related to educational services provided to ICF/MR patients under the age of 22 in state owned or supported institutions by the Department of Education, Division of Special Education, Bureau of Institutional Schools (BIS). The HHS auditors also examined rate years 1979 and 1980 and found that the per diem rates for ICFs/MR for all three years reflected about $30 million in educational costs. The auditors concluded that this resulted in $12,482,898 in Medicaid overcharges ($6,450,054 FFP) because Medicaid reimbursement for educational costs is prohibited by federal regulation.[2] Appellant's Appeal File, Tab B, pp. 3-4.

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[2] Of the $6,450,054 FFP in Medicaid overcharges, the auditors found $35,090 FFP involved Title I expenditures under the Elementary and Secondary Education Act for which the State had already been reimbursed. The State has, however, returned this amount to HCFA and this cost was excluded from the disallowance. Appellant's Appeal File, Tab A, p. 3.

The auditors determined that the BIS costs consisted of the following:

1)	Activities under Title I of the Elementary and Secondary Education Act (Pub. L. 89-313)	8%
2)	Services delivery contracts, the contract vendors being educational collaboratives (school committees or local boards of education, formally joined to meet Massachusetts statute and regulations Chapter 766 special education requirements) and one regional vocational school.	68%
3)	Contracts to evaluate and monitor functions as required by Chapter 766.	11%
4)	State-salaried personnel of the Department of Education, including institution school teachers and institution aides.	13%

Appellant's Appeal File, Tab B, p. 10.

In determining the disallowance amount, the auditors recalculated the per diem rates for all eight ICFs/MR, excluding the reported BIS costs. This calculation resulted in a decrease in the per diem rates. The disallowance amount was calculated by multiplying the decreased per diem rates by the number of Medicaid patient days claimed for the facilities during the period from July 1, 1978 to December 31, 1980 and then applying the federal medical assistance percentage used to determine the federal share. This amount was then deducted from the amount actually claimed by the State to arrive at the disallowed amount.[3]

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[3] The State argued in its brief that the audit report and disallowance letter did not adequately explain how the amount of the disallowance was determined. The State, in its brief, requested the Agency to supply the State with the methodology used to recalculate Medicaid per diem rates. State's Brief, p. 54. At the hearing, the State asked the Agency to explain exactly how the actual amount of the disallowance was arrived at. Transcript, Vol. I, p. 68. The parties agreed to meet after the hearing to work out the exact calculations, and to submit them to the

HCFA, in its disallowance letter, concurred with the auditors' findings that educational costs are not reimbursable under Medicaid. HCFA cited 42 CFR 441.13(b) in support, which provides:

> Payments to institutions for the mentally retarded or persons with related conditions . . . may not include reimbursement for vocational training and educational activities.

Appellant's Appeal File, Tab A.

HCFA also cited Action Transmittal 78-104 which provides:

> . . . if State statute extends responsibility for payment of health services to the education agency, then the Medicaid agency cannot pay for these services . . . .

HCFA noted that Massachuttes law on educating children with special needs, commonly referred to as Chapter 766, under section I provides:

> In light of the policy of the commonwealth to provide an adequate publicly-supported education to every child resident therein, it is the purpose of this act to provide for a flexible and uniform system of special education program opportunities for all children requiring special education, ...

HCFA then cited the Massachusetts Department of Education's Chapter 766 regulations at Chapter 1, Section 122.0, which defines special education as:

Board. Transcript, Vol. I, p. 98. The Board has not received any such submission. However, the record indicates that the HHS auditors met with the State on August 5, 1981, after the draft audit report was issued to the State. During that meeting, the auditors explained how they calculated the disallowance and supplied the State with a copy of the auditors' calculation worksheet. Agency's Appeal File, Tab 2. Therefore, we believe that the State had been fully informed as to how the amount of the disallowance was calculated.

> . . . everything which is required to be provided to a child in need of special education pursuant to the IEP [Individualized Education Plan] for such child.

HCFA also concluded that "State law and regulations extend the responsibility for payment of all related services [support services as are required to assist a handicapped child to benefit from special education] including health services identified under an individual's IEP, to the State's educational agency." Appellant's Appeal File, Tab A.

II. *Summary of Decision*

The State contended that the services provided by BIS are part of an active treatment program required by section 1905(d) of the Social Security Act and specifically intended by Congress to be reimbursable under that section. The State contended, therefore, that the provisions of 42 CFR 440.13(b) which bar reimbursement for educational activities necessarily conflict with the regulations implementing section 1905(d) found at 42 CFR 442, Subpart G and 42 CFR 435.1009. The State also argued that at the very least the purpose of 42 CFR 441.13(b) was merely to prevent a state from claiming federal funds under two or more different programs.

The Agency argued that Medicaid is a statutory program designed to provide medical assistance and was never meant to encompass educational services. The Agency further asserted that provision of "special education" is the responsibility of the state education establishment and for this reason as well would not be reimbursable under Medicaid. According to the Agency, the only possibility for Medicaid reimbursement would be for "related services" as defined in the federal education regulations at 45 CFR 121a.13(a), now 34 CFR 300.13(a). The Agency, however, contended that potential funding for Medicaid

reimbursement for "related services" is not at issue here because the State education statute provides that "special education" will include all related services, and therefore, Medicaid funding is not available for "related services" either. The Agency also argued that even if the Board were to find that "related services" (the Agency pointed out that examples of such services would be medical services, occupational therapy, physically therapy, habilitative activities and psychological services) were not included within the State's definition of "special education," that in this case such services were provided by trained and licensed DMH staff and were not part of the costs disallowed. The Agency explained that for the period in question, BIS costs were not incurred for these services since the BIS staff consisted only of teachers and administrative and clerical staff.

Several of the issues raised by this dispute are identical or similar to those the Board considered in Oklahoma Department of Human Services, Decision No. 367, December 17, 1982. In *Oklahoma*, the Board noted that states receiving federal education funds are required to provide to the handicapped (including the mentally retarded) a free appropriate public education, which means "special education" and "related services," which are defined in federal education program regulations. The Board determined that "special education" costs may not be charged to Medicaid, finding that "special education" is an educational activity within the meaning of 42 CFR 441.13(b) as interpreted in the Agency's Action Transmittal 78-104. The Board, however, noted that if a cost is for a "related service" as defined in the education regulations, and such service is otherwise reimbursable under Medicaid, it may be funded under Medicaid unless such service is made the responsibility of the State education agency by state statute.

Although the State disagreed with the Board's *Oklahoma* decision, *supra*, and asked that we reconsider that decision, we believe that *Oklahoma* was correctly decided. We conclude, therefore, on the basis of the *Oklahoma* decision and the analysis set forth below, that the BIS costs are "special education" costs and therefore, an "educational activity" within 42 CFR 441.13(b).

III. Whether the services provided by BIS are the type of service Congress intended to reimburse under section 1905(d) of the Social Security Act.

a. The regulation denying Medicaid funds for "educational activities" is consistent with the statute.

Under Title XIX of the Social Security Act (Act), "medical assistance" to needy individuals may include payment for intermediate care facility services. Section 1905(a)(15) of the Act. The term "intermediate care facilities services" is defined so that it may include "services in a public institution (or distinct part thereof) for the mentally retarded or persons with related conditions" if certain requirements are met. Section 1905(d). Medicaid funding is available only if the institution's primary purpose is "to provide health or rehabilitative services for mentally retarded individuals," the institution meets standards prescribed by the Secretary of Health and Human Services, the mentally retarded individual for whom Medicaid payments are made is receiving "active treatment," and the state claiming Medicaid funds has agreed to maintain non-federal expenditures for services to ICF/MR patients. Subsections 1905(d)(1), (2), and (3).

Medicaid is a statutory program to provide funds for medical assistance. The statute itself never refers to educational activities. We agree with the Agency that even without the provision contained in 42 CFR 441.13(b), payments for educational activities or vocational training generally would be unauthorized under Title XIX.

We cannot assume or infer that educational services are covered under Medicaid for persons in an institution for the mentally retarded in the absence of a clear Congressional mandate for such coverage. The absence of any direct or indirect reference to such coverage in the Medicaid statue is evidence of the lack of Congressional intent to cover such services. The fact that Congress has enacted other federal statutes to provide federal assistance for educational programs for the mentally retarded conducted by the state educational establishment is further evidence that Congress had no intention of funding these programs under Medicaid. *See*, Pub. L. 89-313, known as Title I of Elementary and Secondary Education Act of 1965; Pub. L. 91-230, known as the Elementary and Secondary Education Amendments of 1970; and Pub. L. 94-142, known as the "Education for All Handicapped Children Act of 1975."

The active treatment requirement imposed as a condition for funding under Title XIX, but not defined therein, does not remedy the lack of authority for Medicaid coverage of educational services. The definition of active treatment in 42 CFR 435.1009 can be seen as a description of what should be provided individuals in an ICF/MR. This regulation defines active treatment as requiring, among other things, an individual plan of care, the overall purpose of which is "to help the individual function at the greatest physical, intellectual, social or vocational level." The definition, however, does not purport to list specific services which will be funded by Medicaid. The State is interpreting the reference to "intellectual" in the regulatory definition as requiring Medicaid to provide funding for all education services.

This is not so. The regulatory description merely provides that, for ICF/MR services to be reimbursable, the individual must be receiving treatment which will aid intellectual functioning. As we indicate in *Oklahoma*, Agency regulations on ICF/MR standards do require qualifying

institutions to provide services which aid in the "intellectual development" of the mentally retarded, as part of "training and habilitation services." 42 CFR Part 442, Subpart G. However, these regulations must be read in conjunction with section 441.13(b), which specifically limits payments for covered services by providing that costs of "educational activities" may not be reimbursed.

The State has argued in its briefs and in the evidence presented that the services provided by BIS are not educational activities but training and habilitation services required to be provided by ICFs/MR. The State, in its video tape presentation, showed the types of services presently provided to ICF/MR residents under the age of 22. The State would have us believe that because the services provided were not traditional educational activities, the prohibition in 441.13(b) is not applicable.

At the outset we note that traditional education, as we know it, is not possible for many of the mentally retarded individuals the State identified as being residents of the facilities at issue here. Accordingly, in looking at the regulation barring reimbursement for educational activities *to institutions for the mentally retarded* we cannot agree that the regulation intended to prohibit merely traditional educational activities. The limitation clearly encompasses the appropriate type of education which would be given to the mentally retarded. Thus, even though we agree with the State that the services depicted in the video tape would not generally be considered traditional educational activities, we nevertheless believe that these services are representative of special educational services required to be provided, as individual need dictates, to school age children under State and federal education statutes and regulations.

An ICF/MR is required by 42 CFR 442.463 to provide "training and habilitative" services intended to aid the intellectual, sensorimotor, and emotional development of a

resident. The Agency did not disallow for any services the State's Department of Mental Health provided under the requirement of 42 CFR 442.463. To the extent that the services provided by BIS are similar to those contemplated by that regulation, those services nevertheless enable BIS to carry out its mandate for providing special education. This is especially true where the costs disallowed here specifically relate to the provision of services mandated by both federal education law and state education law to be provided to school age children. The Agency correctly pointed out that the DMH staff carried out the Medicaid requirements whereas the BIS staff carried out the requirements of the special education law. Where a possibility for overlap between training and habilitation services and special education may exist, we believe that the Agency reasonably drew the line as to what is reimbursable by recognizing what functions the DMH and BIS staffs are required to carry out on a daily basis. In this case, under the Education For All Handicapped Children Act and its predecessor acts cited above, as well as under Massachusetts State Law, Chapter 766, the State is mandated to provide special education programs designed to meet the mentally retarded individual's needs. BIS, not DMH, is the state educational agency responsible for fulfilling the special education mandate at the public ICFs/MR.

Therefore, we conclude that 42 CFR 441.13(b) is consistent with the Medicaid statute.

b. The regulation denying Medicaid funds for "educational activities," is consistent with legislative intent.

The State disagreed with the Board's finding in *Oklahoma*, that 42 CFR 441.13(b) properly interprets Congressional intent. The State took exception to the Board's characterization of Senator Bellmon's remarks at the time the 1971 amendments were introduced. *See, Oklahoma, supra*, p. 5.

We determined that Senator Bellmon's remarks, which we will not repeat here (*see, Oklahoma, supra*, at 5), were "vague at best and certainly cannot be read as support for a conclusion that Congress was requiring funding of all such [educational] activities under Medicaid." We concluded in *Oklahoma* that Senator Bellmon's reference to "educational activities" was part of his description of the types of institutions which exist. We still agree with that characterization. Further, the fact that Senator Bellmon chose to omit "educational activities" from his later description of public institutions which should be funded by Medicaid would not allow us to read into that description "educational services" where that language is not included in the statute or prior legislative history. Finally, we conclude that Senator Bellmon's remarks go to the question of what type of institutions will qualify for Medicaid funding, as opposed to describing the costs in which the federal government will participate.

Further, as we stated in *Oklahoma*, our conclusion that the regulatory prohibition on Medicaid funding for educational activities is consistent with Congressional intent is supported by other considerations. The first is that ICF/MR services are an exception to the general Medicaid rule that services in public institutions (other than medical institutions) are not to be reimbursed. *See*, section 1905(a) of the Act. The second is that Congress specifically expressed in section 1905(d)(3) an intent to enhance services to ICF/MR residents through Medicaid funding and not to replace funding from non-federal sources. Finally, we have already noted that Congress has specifically provided, in other legislation, federal funding for educational services to residents of state institutions. *See*, Pub. L. 89-313 and Pub. L. 94-142. Therefore, there is ample reason to interpret the restriction in 441.13(b) by consid-

ering whether the activities are normally the local government's responsibility and are potentially reimbursable from other federal programs.

The State also disagreed with our finding that 42 CFR 441.13(b) is a long-standing interpretation of Congressional intent and that the legislative history does not indicate a Congressional intent which is inconsistent with the regulation.

The State argued that "Congress intended to improve the condition of the mentally retarded by requiring active treatment, not the warehousing of people, before the federal government would reimburse ICF's for the care of the mentally retarded through the Medicaid program." Appellant's Post-hearing Brief, p. 5. This statement merely reinforces what the Board has already concluded in *Oklahoma*—that in order to receive Medicaid funding, an institution must meet certain requirements, such as providing "active treatment." This statement does not describe the costs in which the federal government will participate. The "active treatment" requirement is a recognition of the concept that institutionalized mentally retarded individuals must be involved in different types of programs and therapies and not just left alone and forgotten. To the extent that 42 CFR 442, Subpart G may implement that concept by listing services that are required to be provided in ICFs/MR, it must be read with the limitation contained in 42 CFR 441.13(b).

The State cited *Connecticut v. Schweiker,* 557 F. Supp. 1077 (D. Conn. 1983) in which the court found that a long-standing agency interpretation does not deserve deference where the issue of statutory construction involves not technical details but the statute's broad purpose. The State alleged that 441.13(b) purports to interpret the Medicaid statute's broad purpose and therefore no deference need be given to the regulation based on its alleged longevity. The fact, however, that an agency promulgates an interpretation and Congress does not act to change it, in spite of having the opportunity, implies that the administrative interpretation is consistent with legislative intent. Regardless of whether 42 CFR 441.13(b) is viewed as interpreting the statute's broad purpose, we believe that it is fully consistent with the statutory framework and legislative intent. The purpose of that regulation as stated in 42 CFR 441.1 is to set forth "limits on FFP for specific services defined in part 440." The regulation implements the basic design of Title XIX of covering medical assistance, not educational activities.

We also cannot agree with the State's assertion that prior to the Oklahoma disallowance there was no indication that the Agency interpreted 42 CFR 441.13(b) to exclude from reimbursement the type of services provided by BIS. On the contrary, the State has not presented any evidence that the Agency has interpreted this regulation in any other way. Furthermore, the State has not convincingly demonstrated why the regulation is not clear on its face as barring reimbursement for the activities in question. Therefore, we cannot accept the State's argument that legislative inaction should not infer approval, where Congress has had ample opportunity to react to the regulatory prohibition by way of subsequent amendment even after the Oklahoma disallowance was taken, and has chosen not to do so.

Therefore, we conclude that there is ample evidence of Congressional intent to support the Agency's regulation.

c. The regulation does not merely preclude duplicate funding.

The State argued that 42 CFR 441.13(b) merely prohibits a State from claiming under Title XIX for services for which the State also received payment under Title I or other federal statutes. The State contended this was HCFA's interpretation as expressed in Action Transmittal HCFA-AT-78-104, dated November 29, 1978. The State

argued, however, that in this case HCFA is interpreting the regulation to mean more than avoidance of duplication of federal grants. The State also contended that the regulation at 42 CFR 441.13(b) conflicts with the Education for All Handicapped Children Act, unless the regulation is interpreted only as preventing double payments. The State argued that because of this conflict, the Action Transmittal is an attempt to reconcile the differences.

We do not agree that 42 CFR 441.13(b) serves only to prevent duplication of federal funds. As we stated in *Oklahoma*, the plain language of this regulation is that it prohibits Medicaid participation in any "educational" activity, whether or not other federal funds have already been paid for that activity. We also do not agree that the State's interpretation is necessary to avoid conflict between the Medicaid statute and the Education for All Handicapped Children Act. As we discussed above, the statutory purpose of Medicaid is the provision of medical assistance. There is no language in the statute providing Medicaid funding for educational activities. Moreover, we have not found any legislative intent requiring the Secretary to fund "educational activities" under Medicaid. Furthermore, we cannot assume or infer Medicaid reimbursement for such activities in the absence of any such legislative intent, particularly when Congress has enacted other laws dealing with special education. Therefore, we do not find any conflict between Medicaid and the Education for All Handicapped Children Act.

If the purpose of the regulation was merely to ensure that federal matching under Medicaid would not extend to services reimbursed by federal education funds, the Agency could have done so explicitly by prohibiting Medicaid funding for services actually funded through the federal educational program. However, section 441.13(b) prohibits funding for any activities potentially covered by another program. This not only prevents duplication of

federal funding but also prevents Medicaid funding for educational activities which are not reimbursable under education statutes.

We also question the validity of the State's argument that prior to the Education for All Handicapped Children Act, most *medically* handicapped children did not have any other financial help to get an education, whereas individuals residing in ICFs/MR were eligible to participate in an active treatment program. This argument overlooks the fact that States received federal education funds for physically handicapped as well as mentally retarded children in state operated and state supported schools for the purpose of special education programs under Pub. L. 89-313. Furthermore, the State here is equating "education" with "active treatment program" and using these terms interchangeably, whereas, in fact, under Pub. L. 89-313, the same federal education funds would be used to provide special education to a mentally-retarded individual residing at an ICF/MR as a physically handicapped child attending a State operated or supported school. The State's analogy here between the physically handicapped and the mentally retarded only reinforces our position that the mentally retarded individual, like the physically handicapped, is not entitled to receive Medicaid funding for that person's special educational needs.

Therefore, we conclude that the State's interpretation of 42 CFR 441.13(b) is not supported by the plain meaning of the regulation or by statutory intent.

d. The distinction between "special education" and "related services" in the Action Transmittal is consistent with the statute and regulations.

One of the bases for the Agency's disallowance here was that the State, under its state standards, must provide all services, including "related services," free of charge to children in need of special education. The State however argued that state standards may not reasonably be used to

determine which services are included in "special education." The State further argued that the Board's distinction between "special education" and "related services" in *Oklahoma* in interpreting 42 CFR 441.13(b) is unsupportable because these concepts did not become part of federal education law until almost two years after 42 CFR 441.13(b) was published in final form. We disagree on both accounts.

Prior to the enactment of the Education for All Handicapped Children Act, the limitation against reimbursement for educational activities provided to individuals in an institution for the mentally retarded, contained in 42 CFR 441.13(b), could be read to have included any service provided to an institutionalized child which was provided by the State education agency. The Education for All Handicapped Children Act, however, set forth distinctions between the services provided by a state educational agency to handicapped children. Therefore, at the time that this statute was enacted, it was necessary to look at its requirements in order to interpret the limits of the exclusion contained in 42 CFR 441.13(b). In view of the distinctions between "special education" and "related services" in this Act, the Agency issued an action transmittal discussing the effect of the Act on Medicaid reimbursement, allowing reimbursement for certain educational support or "related" services under Medicaid. If anything, this interpretation of the regulation liberalized its effect. Therefore, we believe that our conclusion in *Oklahoma* was correct. The action transmittal, which interprets the Education for All Handicapped Children Act and its regulations and how it relates to the prohibition set forth in 42 CFR 441.13(b), makes a distinction under which "special education" is considered an "educational activity" within 42 CFR 441.13(b) and is therefore not reimbursable under Medicaid, but "related services" may be funded under Medicaid.

As we explained in *Oklahoma,* the federal education regulations which define "special education" and "related services" provide guidance as to whether an activity is within the scope of the Medicaid prohibition. Although the action transmittal contains language about providing flexibility to states in deciding what funding sources apply to certain activities, that language is used within the limited context of services which are reimbursable under Medicaid and also qualify as "related services" under the Education for All Handicapped Children Act and the regulations. It is within this very limited context that certain funding choices may be made. However, the action transmittal also states that even these limited choices may not exist where related services are provided by the State educational agency free of charge to all children as part of "special education." *See*, 45 CFR 121a.14(a)(2) now recodified as 34 CFR 300.14(a)(2).

We disagree with the State that state standards may not reasonably be used to determine the services included in "special education." The federal education regulations provide that a state, in providing a free appropriate public education, is free to choose to provide all, some, or no "related services" within the state's own definition of "special education." If it chooses to include some or all "related services" in its definition of "special education," then those services would be available free of charge to all children. The federal education regulation sets forth that if related services are considered part of "special education" under state standards then they will also be considered part of "special education" under federal standards. *See*, 34 CFR 300.14(a)(2). Therefore, after the enactment of the Education for All Handicapped Children Act, state standards provided a reasonable and appropriate vehicle for determining whether Medicaid may provide reimbursement for "related services."

e. Massachusetts state standards include "related services" within the definition of "special education."

Having determined that "related services," which otherwise may be reimbursable under Medicaid, are excluded from reimbursement if state standards include such services as part of a free appropriate public education, it is necessary to look at the Massachusetts law and regulations to determine whether its state education standards extended responsibility for "related services" to the state education agency as part of its definition of "special education."

State standards mandate the State Department of Education to pay for "related services" provided by BIS. The State regulations implementing the State special education laws, known as Chapter 766 regulations, promulgated by the State Department of Education, define at Section 122.0 "special education" as everything that is required to be provided to a child in need of special education pursuant to the IEP for such children. Strictly speaking, under this definition if a service is required to be provided to a child pursuant to its IEP then it must be considered special education and is not reimbursable under Medicaid. However, a further review of the State's education regulations indicates that the State, in section 503 of the education regulations, provides that the certain services as set forth in paragraphs 503.1(a) through 503.1(k) must be provided by each school committee for each child in need of special education, and pursuant to section 322.1, the IEP must indicate specifically which of the services are necessary for the child. The services described include a vocational education program including prevocational and vocational training programs, all services which the various categories of certified or approved special education teachers are professionally qualified to provide, nursing services, peripatology, occupational therapy, physical therapy, speech and language therapy,

limited social and psychological services, the services of physician in prescribing, or referring a child for physical and occupational therapy, and parent and child instruction to enable the parents to participate in educating their child. Because these "services" are included within the definition of "special education," they are not fundable by Medicaid. Therefore, even if the disallowance here included costs attributable to the provision of "related services," we conclude that because "related services" are included within the State's definition of "special education," the State could not receive reimbursement under Medicaid for these services.

IV. Whether the disallowance of specific items of BIS costs is supportable.

The State also made arguments relating to specific cost items of the disallowance taken.

a. Service delivery contracts.

The auditors determined that BIS costs included costs related to contracts issued by BIS in order to provide specific services required by Chapter 766 regulations but which could not be met through existing State personnel. The auditors found that in FY 1979, the cost year on which the 1981 reimbursement rates were based, the recipients of such contracts were several educational "collaboratives," which are defined in Chapter 766 regulations at section 104 as school committees joined under written agreement to satisfy any of the requirements of Chapter 766 regulations, and one regional vocational school.

Clearly, as set forth in the State's Chapter 766 regulations at section 503, a vocational education program is considered part of the delivery of a special education program and would be included, where appropriate, in the child's IEP.

Therefore, the BIS costs for the contract with the vocational school are not reimbursable under our analysis. Furthermore, the prohibition contained in 42 CFR 441.13(b), independently of the restriction for educational activities, prohibits reimbursement for vocational training. Therefore, based on these two factors, we conclude the BIS costs related to the contract with the vocational school were properly disallowed.

As to BIS costs related to contracts with educational collaboratives, we conclude that these costs also were properly disallowed. School committees under Massachusetts State law and regulations are ultimately responsible for the provision of special education programs for school age children residing in its area. *See*, Massachusetts Laws Annotated, Chapter 71B, section 3 and Chapter 766 regulations, section 202. Under the Chapter 766 regulations at section 201.1(b), school committees have the option of entering into a written agreement or contract to satisfy the requirements of the regulations through a collaborative approved by the State Department of Education. The State, here, has not provided any evidence or testimony indicating that the type of services provided by these collaboratives were services other than those required by the Chapter 766 regulations. Since under State regulation, the purpose of the collaborative was to deliver special education services as mandated by law and regulation, we conclude that under our analysis above, the costs were not reimbursable by Medicaid.

b. Evaluative and managerial personnel contracts.

The auditors also determined that BIS costs included cos elated to contracts for personnel to evaluate and monitor functions required by Chapter 766 regulations. Contracts were issued for Evaluation Team Liaisons (ETL) and Program Manager Projects (PM) services.

ETL refers to personnel who, in response to Chapter 766 requirements, participate in annual reviews, develop educational programs, and coordinate communication between the variety of agencies delivering services to BIS children. Many of these contracts were performed by educational collaboratives. The PM contract was for a PM team to monitor BIS service delivery contracts and ETL activities.

Both of these types of contracts were for the purpose of evaluating and monitoring the services required to be provided by Chapter 766 and were inextricably related to the provision of special educational services. Therefore, under our analysis above, we conclude that these costs were not reimbursable under Medicaid.

c. State-salaried personnel of the Department of Education, including, institution school teachers and aides who conducted school programs in the ICFs/MR.

The State claimed that the costs for these personnel were part of the provision of an active treatment program. As we have determined above, the active treatment requirement does not extend to reimbursement for a special education program, and the State has not demonstrated that the services provided by BIS should not be considered special education. Moreover, the Agency here did not disallow any costs incurred for potentially "related services" performed by DMH staff. The disallowance related only to costs incurred by BIS for the State-salaried personnel involved in providing the special education program services.

Our conclusion is fully supported by the evidence. For example, an IEP is required by federal and State education law. BIS is obligated to provide services to those individuals 21 years old or under, as also required by federal and State education laws, whereas Medicaid services to an individual residing in an ICF/MR must be provided regardless of age. In addition, the testimony presented

characterized the BIS program as an "educational program," provided by "educational staff." Transcript, Vol. II, p. 182. Furthermore, testimony of the Assistant Superintendent of Education at the Belchertown State School indicated that she as well as BIS employees at the school are employees of the State Department of Education, that her educational background and professional experience is in teaching and education, and that her responsibilities are to ensure that special education services are provided to eligible (meaning children 21 years old or under) residents of the ICF/MR. Transcript, pp. 104-105, p. 158. The fact that the development of the IEP and ISP, which is required by Title XIX, are prepared jointly between the Department of Education and the Department of Mental Health, would not alter our conclusion. As testimony indicated, although developed jointly, the IEP is prepared by Department of Education staff, and as the State's brief indicated, the plans are developed jointly to avoid duplication of effort. Transcript, p. 107, and Appellant's Brief, p. 43. Therefore, we conclude that the costs disallowed for BIS personnel were for the costs of providing a special education program and are unallowable.

V. Collateral Arguments

a. Whether section 1902(a)(25) of the Social Security Act is a basis for state liability for the costs disallowed.

The Audit Report at page 9 stated that the authority for the statement in the action transmittal, that Medicaid cannot pay for specific health services if a state statute extends responsibility to the education agency, was the third party liability section contained in section 1905(a)(25) [*sic*] of the Act. The State argued in its brief that the State Department of Education could not be a liable third party within the meaning of this section. We need not reach that issue

here. As we explained in depth above, "special education" is considered an "educational activity" under 42 CFR 441.13(b). We also determined that if state standards include related services under its definition of special education, than those services are also considered an educational activity within 42 CFR 441.13(b). We determined here that under Massachusetts State standards, related services are included under the definition of "special education" and therefore, are not reimbursable under Medicaid because of the limitation in 42 CFR 441.13(b).

b. Whether the Developmentally Disabled Assistance and Bill of Rights Act impacts on this disallowance.

The State has argued that in determining what services are included in the active treatment concept, the Board should consider the provisions of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000. The State points to the definition of the term "services for persons with developmental disabilities" at 42 U.S.C. 6001(8), which states that such term includes, among other things, education. The State pointed to this reference and concluded that since this Act related to rights of the mentally retarded for certain services, BIS services therefore should be reimbursable. The State also cited the Supreme Court decision in *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981) as support for the position that the Developmentally Disabled Assistance Act and Medicaid were part of a package of laws to improve the way in which this nation treats the mentally retarded.

In our view, the provisions of the Developmentally Disabled Act are not directly applicable to this dispute. This Act established a federal-state grant program whereby the federal government would provide assistance to states to aid them in creating programs to treat the mentally retarded. The Act is separate and distinct from the

Medicaid Program. Furthermore, the reference to *education* in 42 U.S.C. 6001(8) merely parallels a later provision of the Act, section 6063(b)(2), which recognizes that services are being provided by states under other federally assisted programs including education for the handicapped, vocational rehabilitation, public assistance, medical assistance, and other acts, to name a few. The Act in no way provides that educational services should be considered fundable by Medicaid.

The State's reference to the Court's statement in *Pennhurst* at page 1547 that "Congress in recent years has enacted several laws designed to improve the way in which this Nation treats the mentally retarded" and to the Court's citation of those acts in footnote 25 at page 1547 adds little or no support for its argument that educational services are reimbursable by Medicaid. The State failed to recognize that among the Acts besides Medicaid cited by the Court was the Education for All Handicapped Children Act of 1975. Therefore, we do not find the State's citation to *Pennhurst* persuasive.

c. Whether the regulation at 42 CFR 441.13(b) is an interpretive rule, and if so, whether the regulations at 42 CFR 442, Subpart G, and 42 CFR 435.1009 take precedence over 42 CFR 441.13(b).

The State argued that when Congress amended Title XIX of the Social Security Act to include intermediate care facility services for the mentally retarded, it authorized the Secretary to set standards relating to services provided in an ICF/MR. Section 1905(d)(1) of the Act. The State pointed out that pursuant to this authority, the Secretary promulgated the regulations at 42 CFR 442, Subpart G. The State argued that Congress contemplated that any such regulations would be "legislative rules" because they would be the product of an exercise of delegated legislative power to make law through rules.

The State argued, citing provisions of Kenneth Culp Davis' *Administrative Law Treatise*, Chapter 7, section 8 (supp. 1982), that in contrast, the regulation at 42 CFR 441.13(b) is an interpretive rule because it was issued without delegated legislative power to make law through rules. The State asserted that the court in *Connecticut, supra,* recognized the distinction between legislative and interpretive rules, when it decided that courts, better than agencies, can determine the broad purpose behind a statute. The State, therefore, concluded that because section 441.13(b) is an interpretive rule, when there is a conflict it must fall before the legislative regulation set forth in 42 CFR 442, Subpart G which describes the standards for services required to be provided in an ICF/MR and 42 CFR 435.1009, which defines active treatment. The State implied that if the prohibition against reimbursement under Medicaid was no longer effective, then the costs in question could be reimbursable under Medicaid as training and habilitation services.

Contrary to the State's assertions, 42 CFR 441.13(b) was issued pursuant to delegated power to make rules. The Social Security Act, of which Title XIX is a part, at section 1102 authorizes the Secretary of Health and Human Services to "make and publish such rules and regulations, not inconsistent with this Act, as may be necessary to the efficient administration of the functions with which [the Secretary] is charged under the Act." The Secretary issued the regulation at 42 CFR 441.13(b) pursuant to his delegated authority in section 1102 of the Act. The State has acknowledged in its post-hearing brief at page 3 that the regulation was properly promulgated. Also, the *Connecticut* decision can be distinguished from the instant dispute, in that, the court, in substituting its judgment for the Agency's there, determined that the regulation was not consistent with the statute and legislative history. We have determined here that the regulation is consistent with

the statute and legislative intent, as well as finding that this regulation does not conflict with 42 CFR 442, Subpart G and 42 CFR 435.1009.

VI. The Plan Compliance/Disallowance Issue

In its notice of appeal, the State challenged the Board's jurisdiction to act in this matter, contending that a plan compliance hearing was required pursuant to section 1904 of the Act and the regulations at 45 CFR Part 201. The Board Chair reserved accepting jurisdiction over the dispute until the parties had an opportunity to further brief the issue. The State devoted a substantial portion of its brief to the issue. For reasons stated below, we conclude that the Board does have jurisdiction over this matter. In New Jersey Department of Human Services, Decision No. 259, February 25, 1982, the Board discussed the relevant statutory and regulatory provisions, as well as court decisions on the issue. That discussion will not be repeated here except as necessary to indicate why we disagree with the State's analysis and how subsequent court decisions have view the issue.

Compliance procedures apply only when the Secretary finds *substantial* noncompliance in the administration of the state plan sufficient to justify invoking the potential sanction of denying all future federal funding from the State's program. The sweeping nature of this sanction is also the reason for allowing a state, after it has exhausted its administrative appeal remedies set forth at 45 CFR Part 213, to seek review of a final determination of noncompliance directly in the Court of Appeals. In general, however, a disallowance represents an isolated and highly focused inquiry into a State's operation of the assistance program. It is a finding that specific expenditures claimed by the state for a discrete time period are unallowable. The disallowance determination that improper expenditures

were claimed by a state is retrospective in impact. No prospective sanctions are imposed as a result of a disallowance determination. As we stated in *New Jersey*, noncompliance issues and disallowance issues are not mutually exclusive, so that the same set of facts conceivably could call for either of the procedures. Therefore, the Secretary might determine that a particular set of circumstances requires only a "disallowance" when, arguably, a finding of noncompliance would also have been possible. For example, a particular state action or policy may not constitute *substantial* noncompliance with federal requirements requiring the severe sanction of denial of all future funding, but may nevertheless merit a disallowance of federal funds.

The State argued that the Secretary would always prefer a disallowance action rather than compliance proceedings, because it enables the Secretary to impose a retrospective denial of funds and maximizes the Secretary's chance of a favorable outcome "because the Secretary may not sanction a state prospectively for the manner in which it administers its program unless there is substantial noncompliance with its plan." State's Brief, p. 21. The State further argued that the disallowance here did not contest specific individual items or a class of items but implicated the administration of the program as a whole and that the entire public ICF/MR program is affected by this disallowance inasmuch as reimbursement for habilitative services as part of an active treatment program in Massachusetts' public ICFs/MR is disallowed. State's Brief, p. 18.

There has been no finding of substantial noncompliance in the administration of the State plan by the Secretary here and we have not been persuaded that a finding of substantial noncompliance would be justified. We conclude that the disallowance does not implicate the administration of the State's medical assistance program as a whole. It, in fact, relates to a specific identified class of

unallowable costs related to a specific time period and represents a proportionally small amount of the State's total Medicaid expenditures.

Furthermore, as we have noted above, the only costs identified as unallowable were the costs attributable to BIS provision of educational services. The Agency indicated that the cost of services provided by DMH staff, which included reimbursable habilitative services, was paid by Medicaid. Therefore, contrary to the State's assertion, the Agency did not determine that all services potentially cognizable as "habilitative" were unallowable, but, instead, stated that only services provided by BIS are unallowable because the costs relate to "special educational" activities provided by BIS under State education statutes and regulations. The issue does not involve the broader question that the ultimate beneficiaries are being deprived of required Medicaid services. The disallowance denied reimbursement for cost of activities included by the State in its Medicaid per diem rates which are outside the scope of the Medicaid program. Therefore, we do not find this dispute involves substantial noncompliance.

The State has also asserted that the present dispute is distinguishable from the *New Jersey* decision. The State argued that in *New Jersey* the question of whether a compliance hearing was required was rendered moot by New Jersey subsequently coming into compliance. The State here argued that the issue is not moot. We disagree with the State that this is a critical distinction.

The question of whether a compliance hearing is necessary is determined in the first instance by whether the alleged noncompliance is substantial. Moreover, the compliance procedures and the disallowance procedures are not mutually exclusive. The fact that a State may later come into compliance would not necessarily preclude the

Agency from disallowing for previously claimed unallowable costs. The State argued that the Secretary must choose between the procedures implying that the Secretary may either impose a prospective sanction or a retrospective sanction. This argument assumes that if the Secretary finds substantial noncompliance and initiates compliance proceedings, that the Secretary may not take a disallowance action to recover unallowable costs previously claimed by the State under Medicaid. The argument effectively ignores section 1903(d)(2) of the Act which allows the Secretary to reduce the amount paid to a state for Medicaid to the extent of any overpayment the Secretary determines was made to a state. [NOTE: The Federal Government's authority to recover misspent funds by means of a disallowance pursuant to an overpayment provision was just affirmed by the Supreme Court in *Bell v. New Jersey and Pennsylvania,* 51 U.S.L.W. 4647 (May 31, 1983).]

Furthermore, the State mistakenly relied on several statements taken from court decisions or legislative history. Although a few courts have distinguished compliance issues from "clerical mistakes," we do not think that disallowance procedures are appropriate only where a State is alleged to have made a computational or similar error in claiming FFP. The relevant legislative history refers to "audit exceptions." The basis for an audit exception is often the failure to comply with a federal requirement. The compliance procedures do not have to be invoked in any case involving significant legal questions.[4] Such ques-

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[4] Section 1904 of the Act sets forth the criteria for compliance proceedings as when the Secretary finds "(1) that the plan has been so changed that it no longer complies with the provisions of section 1902; of (2) that in the administration of the plan there is a failure to comply substantially *with any such provision.*" (Emphasis added.)

The U.S. Court of Appeals for the First Circuit, in its decision in *Commonwealth of Massachusetts v. Departmental Grant Appeals*

tions can arise from disallowances based on audits or similar reviews even though there are only discrete items of cost in dispute and no finding of substantial noncompliance by a state in administering its program.

The State's reliance on its diligence in claiming that the dispute here is a compliance dispute is also misplaced. Although court decisions indicate that failure to raise the issue may contribute to a court finding that a disallowance is involved, nothing in the court decisions indicates that a state's diligence in insisting that a compliance dispute is involved is sufficient.

Finally, comity and equity do not require a compliance hearing here. Appeal Brief, pp. 25-26. The State relied for this argument on a statement (made by Senator Javits on the Senate floor) which relates to the need for hearings and judicial review to avoid disruption in an existing state plan. *See*, 116 Cong. Rec. 3068 (1965). This refers to provisions for review of denial of approval of state plan amendments and was used by the court in the case of *State Department of Public Works of the State of Texas v. Califano*, 556 F.2d 326, 332 (5th Cir. 1977), *cert. denied*, 439 U.S. 818 (1978), as support for its view that that dispute was over plan conformity. There is no question here about the State's plan conforming to applicable requirements. Moreover, the *Texas* Court's statement that the compliance-type hearing put a state on a "more equal

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Board, 698 F.2d 22 (1st Cir. 1983) indicated that if the language, "any such provision" in section 1904 of the Act is read as meaning any provision of federal law, the result would be that (1) every refusal of FFP becomes a determination of noncompliance, that (2) the idea of a disallowance is read out of the statute, and that (3) the "any such provision" language becomes meaningless. The Court stated that "[s]imply accepting that there is a dispute about some sort of federal requirement cannot suffice to make this a compliance question." *Supra*, at pp. 28 and 29.

basis" than a disallowance reconsideration was premised in part on the Court's view that the latter procedures were "summary."

The Board's procedures for reconsidering disallowances provide substantially the same protections as the compliance procedures.[5]

Moreover, the U.S. Court of Appeals for the Seventh Circuit decided in *State of Illinois v. Schweiker*, Nos. 82-1175 and 82-1752 (7th Cir. May 6, 1983), that the problem with the functional approach to interpreting whether a dispute is properly a compliance proceeding used by the other courts, including the Third Circuit, is that it is complicated and uncertain in application. The court indicated that a jurisdictional test should be clear in order to allow a litigant to know in which court he belongs. Therefore, the court determined that clearest way of deciding the jurisdictional issue in these disputes is to take a literal approach. Under this approach, the court determined that if the Secretary processes a matter as a disallowance matter, then it will be treated as such and the Court of Appeals will not have jurisdiction.

Accordingly, we conclude that this dispute is a disallowance action over which this Board has jurisdiction.

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[5] The U.S. Court of Appeals for the Third Circuit, in its decision in *State of New Jersey v. Department of Health and Human Services*, 670 F.2d 1284 (3rd Cir. 1981), indicated that the Board's action there was an "opportunity for a hearing" sufficient to satisfy statutory requirements for compliance proceedings. At note 13.

Conclusion

For the reasons stated above, we uphold the entire disallowance of BIS costs for educational activities.[6]

Cecilia Sparks Ford

Norval D. (John) Settle

Donald F. Garrett
Presiding Board Member

[6] The State requested the Board to issue certain rulings in its favor concerning issues in this case. Based on our decision here, we need not specifically rule on the requests because they go to the substantive issues which we have decided above. *See,* Appellant's Request for Rulings.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1109

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF-APPELLEE,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
DEFENDANT, APPELLANT.

Entered: March 31, 1987

JUDGMENT

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed in part, vacated in part and the cause is remanded to the district court for further action consistent with the opinion filed this day.

Each party to bear its own costs.

By the Court:

/s/ FRANCIS P. SCIGLIANO
Francis P. Scigliano, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1118

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC WELFARE,
PLAINTIFF-APPELLEE,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
DEFENDANT, APPELLANT.

Entered: March 31, 1987

JUDGMENT

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

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Each party to bear its own costs.

By the Court:

/s/ FRANCIS P. SCIGLIANO
Francis P. Scigliano, Clerk.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1109

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF,
APPELLEE,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT,
APPELLANT.

No. 86-1118

COMMONWEALTH OF MASSACHUSETTS, DEPARTMENT OF
PUBLIC WELFARE, PLAINTIFF, APPELLEE,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT,
APPELLANT.

Entered: June 2, 1987

ORDER OF COURT

Before: CAMPBELL, *Chief Judge,* COFFIN, BOWNES, BREYER, TORRUELLA and SELYA, *Circuit Judges.*

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and

the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc,

It is ordered that the petition for rehearing and suggestion for rehearing en banc be denied.

By the Court:

/s/ FRANCIS P. SCIGLIANO
Francis P. Scigliano, Clerk.

APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 85-2337-G

COMMONWEALTH OF MASSACHUSETTS,
BY ITS DEPARTMENT OF PUBLIC WELFARE,
PLAINTIFF,

v.

MARGARET HECKLER, AS SHE IS SECRETARY OF
THE DEPARTMENT OF HEALTH & HUMAN SERVICES,

CAROLYN DAVIS, AS SHE IS ADMINISTRATOR OF
THE HEALTH CARE FINANCING ADMINISTRATION OF
THE DEPARTMENT OF HEALTH & HUMAN SERVICES,

AND

NORVAL D. SETTLE, JUDITH A. BALLARD,
AND DONALD F. GARRETT, AS THEY CONSTITUTE THE
DEPARTMENTAL GRANT APPEALS BOARD OF THE
DEPARTMENT OF HEALTH & HUMAN SERVICES, DEFENDANTS.

INTRODUCTION

1. By this complaint, the plaintiff Commonwealth of Massachusetts (the Commonwealth), seeks judicial review of a final decision of the Departmental Grant Appeals Board of the Department of Health and Human Services (the Board), which sustained the Health Care Financing Administration's (HCFA) disallowance of $4,908,994 in

federal financial participation due to the Commonwealth under the Medical Assistance Program (Medicaid) of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.* This action also seeks declaratory and injunctive relief pursuant to 5 U.S.C. §§ 702 and 703, and 28 U.S.C. § 2201, to determine the rights and obligations of the Commonwealth under the Medicaid program and to prevent the wrongful withholding of federal reimbursement.

JURISDICTION

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331. No special statutory form of proceeding is provided for review of the decision of the Board. This Court has venue by virtue of 28 U.S.C. § 1391(e). The United States has waived its immunity by 5 U.S.C. § 702.

RELATED CASE

3. The facts and legal issues presented by this case are in all material respects similar to those presented in *Commonwealth of Massachusetts* v. *Heckler, et al.*, U.S.D.C. Civil Action No. 83-2523-G (D. Mass.). In that case, the Commonwealth challenges HCFA's disallowance of $6,414,964 in reimbursement for services provided at ICF/MRs during an earlier period, July 1, 1978, through December 31, 1980. The disallowances at issue here and in Civil Action No. 83-2523-G purportedly rest on the same legal ground. The cases are therefore "related" for purposes of U.S. Dist. Ct. Local Rule 8(e).

PARTIES

4. The Commonwealth is a sovereign State of the United States. The Department of Public Welfare (DPW) is a department of the Commonwealth organized pursuant

to Chapter 18 of the Massachusetts General Laws. The Commonwealth, by DPW, is a party aggrieved by the final decision of the Board.

5. Margaret Heckler is the Secretary of the United States Department of Health and Human Services (the Secretary).

6. Carolyn Davis is the Administrator of the Health Care Financing Administration of the Department of Health and Human Services.

7. Norval D. Settle, Judith A. Ballard, and Donald F. Garrett are members of the panel of the Board which rendered the final decision appealed herein.

FACTUAL ALLEGATIONS

8. The Medicaid Assistance Program (Medicaid) is a joint state and federal program authorized by and operated pursuant to Title XIX of the Social Security Act of 1935, as amended (42 U.S.C. §§ 1396 *et seq.*,), in which participating states share with the federal government the cost of financing a program administered by the states for the benefit of certain persons needing medical care and services.

9. The Commonwealth participates in the Medicaid program pursuant to Mass. Gen. Laws ch. 118E. Pursuant to 42 U.S.C. § 1396a, the Commonwealth operates its program in accordance with a state plan for medical assistance which has been approved by the Secretary. DPW is the "single state agency" responsible for administering the state plan for Massachusetts.

10. The Secretary, through HCFA, administers the Medicaid program for the federal government pursuant to 42 U.S.C. §§ 1396 *et seq.*, and 42 U.S.C. §§ 1301 *et seq.*

11. The amount the federal government reimburses the state for expenditures under the Medicaid program is the "federal financial participation" (FFP). The

Commonwealth receives FFP at the rate of approximately fifty (50) percent of the total amount expended under its plan for medical assistance.

12. On August 20, 1984, HCFA informed DPW that, based on its audit of services provided to residents of Massachusetts ICF/MRs during the period January 1, 1981, through June 30, 1982, HCFA intended to disallow $4,908,994 in FFP.

13. According to the Board, the disallowance was based on Medicaid "program regulations" which "preclude reimbursement since they expressly bar payment for vocational training and educational activities for individuals in ICF/MRs. 42 C.F.R. 441.13(b)." Board Decision No. 638, March 29, 1985, at 1 (copy attached hereto).

14. In Decision No. 638, dated March 29, 1985, the Board upheld the disallowance of the $4,908,994 in FFP. Decision No. 638 is the final decision of the Secretary in this matter.

STATEMENT OF CLAIMS

15. The decision of the Board should be reversed because it is:

A. based upon errors of law, including without limitation an erroneous interpretation and application of 42 U.S.C. §§ 1396d(c) and 1396d(d);

B. arbitrary, capricious, and an abuse of discretion in that it denies reimbursement for services mandated by federal law;

C. arbitrary and capricious in that it denies reimbursement for services previously held by the Secretary to be reimbursable under the Medicaid program;

D. in excess of statutory authority in that it is based upon an application of 42 C.F.R. § 441.13(b) inconsistent with 42 U.S.C. §§ 1396d(c) and 1396d(d);

E. unsupported by substantial evidence in that the record reasonably permitted no conclusion other than that the services provided to residents at Massachusetts ICF/MRs and in question here were habilitative services mandated by and reimbursable under the Medicaid program.

16. The errors set forth above materially prejudice the rights of plaintiff Commonwealth of Massachusetts, DPW.

REQUESTS FOR RELIEF

WHEREFORE, the plaintiff requests that this Court grant the following relief:

1. Enjoin the Secretary and HCFA from failing or refusing to reimburse the Commonwealth, or from recovering from the Commonwealth, the federal share of expenditures for medical assistance to eligible residents of intermediate care facilities for the mentally retarded during the period in question.

2. Set aside the Board's Decision No. 638.

3. Grant such declaratory and other relief as the Court deems just.

COMMONWEALTH OF MASSACHUSETTS
By its attorneys,
FRANCIS X. BELLOTTI
ATTORNEY GENERAL

/s/ THOMAS A. BARNICO

Thomas A. Barnico
Assistant Attorney General
Department of the Attorney General
Government Bureau
One Ashburton Place, Room 2019
Boston, Massachusetts 02108
617-727-1004

Date: June 5, 1985

APPENDIX L

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 83-2523-G

COMMONWEALTH OF MASSACHUSETTS, BY ITS DEPARTMENT OF PUBLIC WELFARE, PLAINTIFF,

v.

MARGARET HECKLER, AS SHE IS SECRETARY OF THE DEPARTMENT OF HEALTH & HUMAN SERVICES,

CAROLYNE DAVIS, AS SHE IS ADMINISTRATOR OF THE HEALTH CARE FINANCING ADMINISTRATION OF THE DEPARTMENT OF HEALTH & HUMAN SERVICES,

AND

NORVAL D. SETTLE, CECELIA SPARKS FORD, AND DONALD F. GARRETT, AS THEY CONSTITUTE THE DEPARTMENTAL GRANT APPEALS BOARD OF THE DEPARTMENT OF HEALTH & HUMAN SERVICES, DEFENDANTS.

COMPLAINT

INTRODUCTION

1. By this complaint, the plaintiff seeks judicial review of a final decision of the Departmental Grant Appeals Board of the Department of Health and Human Services (hereafter "the Board"), which sustained the Health Care Financing Administration's (hereinafter "HCFA") disallowance of $6,414,964 in federal financial partici-

pation due to the Commonwealth of Massachusetts under the Medical Assistance Program (Medicaid) of the Social Security Act, 42 U.S.C. §§1396 *et seq.* This action also seeks declaratory and injunctive relief pursuant to 5 U.S.C. §§ 702, 703, and 28 U.S.C. § 2201 to determine the rights and obligations of the Commonwealth under the Medicaid program and to prevent the wrongful withholding of federal reimbursement funds.

Jurisdiction

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C § 1331. No special statutory form of proceeding is provided for review of the decision of the Board. This Court has venue by virtue of 28 U.S.C. § 1391(e). The United States has waived its immunity by 5 U.S.C. § 702.

Parties

3. The Commonwealth of Massachusetts (hereinafter "the Commonwealth") is a sovereign State of the United States. The Department of Public Welfare (hereinafter "DPW") is a department of the Commonwealth organized pursuant to chapter 18 of the Massachusetts General Laws. The Commonwealth, by the DPW, is a party aggrieved by a decision of the Board.

4. Margaret Heckler is the Secretary of the United States Department of Health and Human Services (hereinafter "the Secretary").

5. Carolyne [*sic*] Davis is the Administrator of the Health Care Financing Administration of the Department of Health and Human Services.

6. Norval D. Settle, Cecilia Sparks Ford, and Donald F. Garrett are members of the panel of the Board which rendered the decision of which the Commonwealth seeks review.

Factual Allegations

7. The Medical Assistance Program (Medicaid) is a joint state and federal program authorized by and operated pursuant to Title XIX of the Social Security Act of 1935, as amended (42 U.S.C. §§ 1396 *et seq.*), in which participating states share with the federal government the cost of financing a program administered by the states for the benefit of certain persons needing medical care and services.

8. The Commonwealth participates in the Medicaid program pursuant to G.L. c. 118E. Pursuant to 42 U.S.C. § 1396a, the Commonwealth operates its program in accordance with a state plan for medical assistance which has been approved by the Secretary. DPW is the "single state agency" responsible for administering the state plan for Massachusetts.

9. The Secretary, through HCFA, administers the Medicaid program for the federal government pursuant to 42 U.S.C. §§ 1396 *et seq.* and 42 U.S.C. §§ 1301 *et seq.*

10. The amount the federal government reimburses the state for expenditures under the Medicaid program is the "federal financial participation" (hereinafter "FFP"). The Commonwealth receives FFP at the rate of approximately fifty (50) percent of the total amount expended under its plan for medical assistance.

11. On March 5, 1982, the Regional Audit Director of HHS submitted to DPW a report entitled "Review of Medicaid Payments to State-Owned Intermediate Care Facilities for the Mentally Retarded as Administered by the Massachusetts Department of Public Welfare." The audit report covered the period from July 1, 1978 to December 31, 1980.

12. By a letter dated August 23, 1982, the Regional Administrator of HCFA notified the DPW that after review of the audit he had determined to disallow $6,414,964 in FFP.

13. According to the Board, the bases for the disallowance were "that (1) the State had incorrectly claimed reimbursement for the cost of vocational training and educational activities provided to residents of intermediate care facilities for the mentally retarded and (2) those activities are available free of charge to all children under Massachusetts State law." Board Decision at 1.

14. In Decision No. 438, dated May 31, 1983, the Board upheld the disallowance of $6,414,964 in FFP. A copy of Decision No. 438 is attached hereto. Decision No. 438 is the final decision of the Secretary in this matter.

Statement of Claims

15. The decision of the Board should be reversed because it is:

A. Based upon errors of law.
B. Arbitrary, capricious, and an abuse of discretion.
C. In excess of statutory jurisdiction and authority.
D. Based upon improperly promulgated regulations.
E. Unsupported by substantial evidence.

16. The errors set forth above materially prejudice the rights of plaintiff DPW.

Requests for Relief

Wherefore, the plaintiff requests that this Court grant the following relief:

1. Enjoin the Secretary and the Administrator from failing or refusing to reimburse the Commonwealth or from recovering from the Commonwealth the federal share of expenditures for medical assistance to eligible residents of intermediate care facilities for the mentally retarded.

2. Set aside the Board's Decision No. 438.

3. Grant such declaratory and other relief as the Court deems just.

By its attorneys,
FRANCIS X. BELLOTTI
ATTORNEY GENERAL

/s/ THOMAS A. BARNICO

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Dated: August 26, 1983

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(3)

Supreme Court, U.S.
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DEC 15 1987
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CLERK

No. 87-712

In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

	Page
Cases:	
Connecticut v. *Schweiker*, 557 F. Supp. 1077 (D. Conn. 1983), rev'd, 731 F.2d 1052 (2d Cir. 1984), aff'd *sub nom. Connecticut Dep't of Income Maintenance* v. *Heckler*, 471 U.S. 524 (1985)	3
Insurance Corp. of Ireland v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982)	4
Minnesota ex rel. Noot v. *Heckler*, 718 F.2d 852 (8th Cir. 1983)	3
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Tucker Act, 28 U.S.C. 1491	2
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The Secretary of Health and Human Services disallowed certain expenses incurred by respondent during the years 1978-1982, which respondent claimed were reimbursable under the Medicaid program. Respondent sought judicial review of that decision in the United States District Court for the District of Massachusetts, which assumed jurisdiction over the case. On appeal, the court of appeals reached two important jurisdictional conclusions: (1) that the district court lacked jurisdiction to "consider the claim for money past due" (Pet. App. 5a); and (2) that the district court nevertheless had jurisdiction to grant declaratory and injunctive relief "limited to * * * prospective relief" (*id.* at 7a). We agree with the first of those two holdings but have challenged the second in our petition.[1] Respondent disagrees with the first holding and makes no attempt to defend the second. Respondent nevertheless urges this

---

[1] We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1). That fact was inadvertently omitted from the "jurisdiction" section of our petition.

Court to deny certiorari. We submit that the Court should, instead, grant both our petition and respondent's cross-petition (No. 87-929). We respond below to the reasons suggested by respondent for denying certiorari. We respond in a separate memorandum, filed today, to respondent's cross-petition.

1. Our petition challenges the court of appeals' decision splitting this case into two causes of action, one within the exclusive jurisdiction of the United States Claims Court under the Tucker Act, 28 U.S.C. 1491, and one within the jurisdiction of the district court under 28 U.S.C. 1331. Respondent makes no attempt to argue that this division of the case was proper. Rather, respondent contends that the entire case belongs in the district court (see Br. in Opp. 8-18; 87-929 Cross-Pet. 9-13). Respondent therefore appears to suggest that, because the court of appeals should have affirmed the district court's jurisdiction over the *entire* case, this Court should not review a judgment upholding the district court's jurisdiction over *part* of the case.

But respondent's position that the district court had jurisdiction over the entire case is hardly so plainly correct that this Court should ignore the serious claim-splitting issue raised by our petition. If (as we contend and as the court of appeals held) at least part of this lawsuit was not cognizable in district court, then—as we showed in our petition—there is a sharp split in the circuits as to whether it is permissible to divide the case into two actions, as opposed to requiring that the entire case proceed in the Claims Court under the Tucker Act. Thus, unless the Court is prepared to agree with respondents' view of the jurisdictional questions presented without further briefing and argument, a grant of both our petition and respondent's cross-petition is the appropriate course.

2. Respondent does not seriously contest our assertion that there is a conflict in the circuits on the claim-splitting

issue raised by our petition. Rather, respondent asserts (Br. in Opp. 15 & n.3) that the conflict is unworthy of resolution by this Court because none of the cases we cite as being in conflict with the decision below is a grant disallowance case. But the fact that the present case involves a grant disallowance rather than some other underlying dispute has no bearing on the claim-splitting question. It is, at most, relevant only to the question raised by the cross-petition. If (as we contend and the court of appeals held) respondent's attempt to recover past-due money is cognizable only under the Tucker Act in the Claims Court, then there is nothing special about grant disallowance cases that would affect the proper analysis of whether that part of the lawsuit can be divorced from the "prospective" part of the lawsuit. Indeed, both of the courts of appeals that have allowed claim splitting in the context of review of Medicaid disallowance decisions have recognized that their reasoning was in conflict with the reasoning of some of the cases involving different underlying claims that we have cited in our petition. See Pet. App. 6a n.1; *Minnesota ex rel. Noot* v. *Heckler*, 718 F.2d 852, 858 n.11 (8th Cir. 1983).

3. Respondent accurately notes (Br. in Opp. 6-7) that, at an early stage of this litigation, the Secretary chose as a matter of policy not to contest the district court's jurisdiction. It is also true that there were other cases in which the jurisdictional arguments we now make could have been made but were not made. See, *e.g.*, *Connecticut* v. *Schweiker*, 557 F. Supp. 1077 (D. Conn. 1983), rev'd, 731 F.2d 1052 (2d Cir. 1984), aff'd *sub nom. Connecticut Dep't of Income Maintenance* v. *Heckler*, 471 U.S. 524 (1985); see also *New Jersey* v. *Department of Health & Human Services*, 670 F.2d 1300, 1304 n.8 (3d Cir. 1982). These facts do not mean, however, as respondent contends, that the Secretary's "current position is not so ob-

vious or pressing as to require immediate attention" (Br. in Opp. 19 n.4).

Although the correctness of our position is of course not "obvious," that is hardly a reason for this Court to deny review. This Court sits to resolve difficult and unsettled questions of law, not questions whose resolution is "obvious." And the issues in this case—both those raised in our petition and those raised in the cross-petition—are difficult and unsettled, as is demonstrated by the circuit splits discussed in our petition and in our memorandum in response to the cross-petition. Those circuit splits further demonstrate that there is a pressing need for resolution of the issues in this case.

If respondent is suggesting that review is inappropriate merely because the government's position on those issues has changed over time, then we disagree. As an initial matter, the change that has taken place in the government's position has to do with whether the Claims Court or the district court is the correct forum for the resolution of grant disallowance cases in their entirety—the issue raised by the cross-petition. The government has never agreed with the position of the court of appeals in this case that such cases should be bifurcated between the district court and the Claims Court. More fundamentally, the issue is one of *jurisdiction,* and it is the correctness or incorrectness of our position—not the consistency with which that position has been asserted in the past—that must govern. Accordingly, the court of appeals quite properly inquired into the jurisdiction of the district court,[2] even though no objection had been pursued in the district court. The court of appeals resolved the jurisdictional questions, agreeing with the government in part and with respondent in part. Both aspects of the court's decision stand as important precedents, and are in conflict with the decisions of other

[2] See Fed. R. Civ. P. 12(h)(3); *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982).

courts of appeals. Thus, review by this Court is fully appropriate.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

DECEMBER 1987

U.S. GOVERNMENT PRINTING OFFICE 1987—202 037/60160

(13)

No. 87-712

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS

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REPLY MEMORANDUM FOR THE PETITIONERS

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1 pp

TABLE OF AUTHORITIES

	Page
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But respondent's position that the district court had jurisdiction over the entire case is hardly so plainly correct that this Court should ignore the serious claim-splitting issue raised by our petition. If (as we contend and as the court of appeals held) at least part of this lawsuit was not cognizable in district court, then—as we showed in our petition—there is a sharp split in the circuits as to whether it is permissible to divide the case into two actions, as opposed to requiring that the entire case proceed in the Claims Court under the Tucker Act. Thus, unless the Court is prepared to agree with respondents' view of the jurisdictional questions presented without further briefing and argument, a grant of both our petition and respondent's cross-petition is the appropriate course.

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3. Respondent accurately notes (Br. in Opp. 6-7) that, at an early stage of this litigation, the Secretary chose as a matter of policy not to contest the district court's jurisdiction. It is also true that there were other cases in which the jurisdictional arguments we now make could have been made but were not made. See, *e.g.*, *Connecticut* v. *Schweiker*, 557 F. Supp. 1077 (D. Conn. 1983), rev'd, 731 F.2d 1052 (2d Cir. 1984), aff'd *sub nom. Connecticut Dep't of Income Maintenance* v. *Heckler*, 471 U.S. 524 (1985); see also *New Jersey* v. *Department of Health & Human Services*, 670 F.2d 1300, 1304 n.8 (3d Cir. 1982). These facts do not mean, however, as respondent contends, that the Secretary's "current position is not so ob-

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[2] See Fed. R. Civ. P. 12(h)(3); *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982).

courts of appeals. Thus, review by this Court is fully appropriate.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

DECEMBER 1987

U.S. GOVERNMENT PRINTING OFFICE 1987—201-057/60160

Supreme Court, U.S.
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CLERK

Nos. 87-712 and 87-929

In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, CROSS-PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI (No. 87-712) FILED OCTOBER 30, 1987
CROSS-PETITION FOR A WRIT OF CERTIORARI (No. 87-929) FILED DECEMBER 2, 1987
CERTIORARI GRANTED JANUARY 11, 1988

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-712

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS

No. 87-929

COMMONWEALTH OF MASSACHUSETTS, CROSS-PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

TABLE OF CONTENTS

		Page
1.	Relevant Docket Entries in the Court of Appeals	1
2.	Relevant Docket Entries in the District Court	11
3.	Letter from Neil H. Kaufman, Executive Secretary, Departmental Grant Appeals Board, to Counsel dated 6/30/83	18

CONTENTS—Continued: Page

4. Defendants' Memorandum Concerning Subject Matter Jurisdiction dated 12/29/83 19
5. Plaintiff's Motion for Summary Judgment dated 11/13/84 23
6. Defendants' Motion for Summary Judgment dated 1/25/85 25
7. Answer of Federal Defendants in D. Mass. Civil Action No. 85-2337-G dated 7/9/85 27
8. Orders Allowing Certiorari dated 1/11/88 29

The following opinions, decisions, judgments, orders, and complaints have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed petition for a writ of certiorari in No. 87-712:

HHS Decision dated 5/31/83 ..... 53a
Complaint dated 8/26/83 ..... 95a
District Court's Orders dated 11/8/83 and 1/11/84 ..... 37a
HHS Decision dated 3/29/85 ..... 39a
Complaint dated 6/5/85 ..... 89a
District Court's Memo and Order dated 8/27/85 .. 17a
District Court's Judgment dated 10/7/85 ..... 32a
District Court's Memo and Order dated 11/25/85 ..... 33a
District Court's Judgment dated 12/2/85 ..... 36a
Court of Appeals' Opinion dated 3/31/87 ..... 1a
Court of Appeals' Judgments dated 3/31/87 ..... 85a
Court of Appeals' Order Denying Rehearing dated 6/2/87 ..... 87a

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1109

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF-APPELLEE

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
DEFENDANT, APPELLANT

DOCKET ENTRIES

DATE	FILINGS – PROCEEDINGS	Filed
1986		
Feb. 14	Record on appeal in one volume, received and filed. Case docketed. Notices mailed.	(ms)
Feb. 21	Appearance of George Eng, Esq., for appellant received and filed.	(kn)
Feb. 24	Appellant's statement of issues, received and filed.	(lw)
Feb. 24	Appearance of William Kanter, Esq. and Howard S. Scher, Esq. for appellant received and filed.	(lw)
Feb. 25	Motion filed. Order (Breyer, J.) consolidating these cases. Further, enlarging time for appellant in 86-1109 to file its brief and the appendix to its brief to and including March 26, 1986. Notice mailed.	(lb)

DATE	FILINGS – PROCEEDINGS	Filed
Feb. 26	Appellant's Docketing Statement, received and filed.	(lw)
Feb. 27	Appearance of Thomas A. Barnico, Esq., for appellee, received and filed.	(lw)
Feb. 28	Appearance of Jason W. Mann, Esq., for appellant, received and filed.	(lw)
March 12	Appellant's "Motion For Extension Of Time Within Which To File Opening Brief", received and filed.	(al)
	Appellant's "Motion To Defer Filing Of Joint Appendix", received and filed.	(al)
	ORDER: (Torruella, J) granting parties leave to proceed upon deferred appendix upon following conditions: The prosecution is not to be delayed due to using deferred appendix. The deferred appendix is due 14 days after service of the brief for appellee. Appellant's initial brief is due April 16, 1986 and appellee's initial brief is due within 21 days after service of appellant's initial brief, and both briefs are due to be filed in final form within 10 days of the filing of the deferred appendix. Notices mailed.	(al)
April 18	Motions filed. Order: (Campbell, Ch.J.) granting leave for appellant to file its initial brief instanter; and further, granting leave for appellant to file a 53 page brief. Notices mailed.	(sb)
	Brief for the appellants, received and filed. Notices mailed.	(sb)

DATE	FILINGS – PROCEEDINGS	Filed
May 2	Motion filed. Order: (Bownes, J.) enlarging the time for appellee to file its brief to and including May 20, 1986. Notices mailed.	(sb)
May 16	Motion filed. Order (Bownes, J.) enlarging the time for appellee to file its initial brief to and including May 28, 1986. Notices mailed.	(lr)
May 20	Brief for Commonwealth of Pennsylvania amicus curiae, received and filed.	(al)
May 30	Motions filed. Order: (Bownes, J.) granting leave for appellee to file a fifty-eight page brief instanter. Notices mailed.	(sb)
	Brief for appellee, Commonwealth of Massachusetts, received and filed.	(sb)
June 6	Letter Motion of amicus curiae, Comm. of Pennsylvania, to argue, received and filed.	(al)
June 11	Motion filed. ORDER (Coffin, J.) enlarging the time for filing the reply brief for appellant and the deferred joint appendix to and including June 26, 1986. Notices mailed.	(al)
June 19	ORDER (Campbell, Ch. J., Coffin, and Bownes, JJ) Treating the Commonwealth of Pennsylvania's June 3, 1986 letter as a motion for oral argument, the motion is denied. Notices mailed.	(al)
June 27	Reply brief of the appellants received and filed.	(lb)

DATE	FILINGS–PROCEEDINGS Filed
June 30	Brief for appellant in final form and deferred joint appendix in volumes I, II and III, received and filed by leave of court. (al)
July 9	Brief for plaintiff-appellee in final form, received and filed. (ms)
Sept. 29	Assigned for hearing at the October, 1986 session. (sb)
Oct. 8	Heard before Coffin, Breyer and Torruella, JJ. (sb)
Oct. 21	Motion For Leave To File Post-Argument Memorandum, received and filed. (ms).
1987	
March 31	ORDER (Coffin, Breyer and Torruella, JJ) Upon consideration of appellant's motion to file a Post-Argument Memorandum, said motion is granted. Notices mailed. (al)
March 31	Secretary of Health and Human Service's Post Argument Memorandum, received and filed. (al)
March 31	JUDGMENT: The judgment of the district court is affirmed in part, vacated in part and the cause is remanded to the district court for further action consistent with the opinion filed this day. Each party to bear its own costs. Opinion of the Court by, Torruella, J. Notices mailed. (al)

DATE	FILINGS–PROCEEDINGS Filed
April 10	Motion filed. ORDER: (Torruella, J.) enlarging the time for the Secretary of Health and Human Services to file a petition for rehearing or petition for rehearing with suggestion for rehearing en banc to and including May 14, 1987. Notices mailed. (ljr)
May 14	Petition For Rehearing With Suggestion For Rehearing En Banc of appellant, received and filed. (lr)
June 2	ORDER (Campbell, Ch. J., Coffin, Bownes, Breyer, Torruella and Selya, JJ.) denying the petition for rehearing and the suggestion for a rehearing en banc. Notices mailed. (al)
June 10	Mandate issued. Copy filed. Original papers returned to the district court. Notices mailed. (pm)
Dec. 17	Notice of Certiorari to Supreme Court. (cd)
	Notice of certiorari to the Supreme Court (December 2, 1987) SC# 87-929. (al)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1118

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC WELFARE,
PLAINTIFF-APPELLEE

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
DEFENDANT, APPELLANT

DOCKET ENTRIES

DATE	FILINGS – PROCEEDINGS	Filed
1986		
Feb. 19	Record on Appeal in One Volume, received and filed. Case docketed and notices mailed.	(lw)
Feb. 21	Appearance of George Eng., Esq., for appellant received and filed.	(kn)
Feb. 25	Motion filed. Order (Breyer, J.) consolidating these cases. Further, enlarging time for appellant in 86-1109 to file its brief and the appendix to its brief to and including March 26, 1986. Notices mailed.	(lb)
	Appellant's docketing statement received and filed.	(lb)

DATE	FILINGS – PROCEEDINGS	Filed
Feb. 27	Statement of issues received and filed.	(ms)
Feb. 27	Appearance of Howard S. Scher & William Kanter for appellant. received and filed.	(ms)
Feb. 27	Appearance of Thomas A. Barnico for appellant. received and filed.	(ms)
March 12	Appellant's "Motion For Extension Of Time Within Which To File Opening Brief", received and filed.	(al)
	Appellant's "Motion To Defer Filing Of Joint Appendix", received and filed.	(al)
	ORDER: (Torruella, J) granting parties leave to proceed upon deferred appendix upon following conditions: The prosecution is not to be delayed due to using deferred appendix. The deferred appendix is due 14 days after service of the brief for appellee. Appellant's initial brief is due April 16, 1986 and appellee's initial brief is due within 21 days after service of appellant's initial brief, and both briefs are due to be filed in final form within 10 days of the filing of the deferred appendix. Notices mailed.	(al)
April 18	Motions filed. Order: (Campbell, Ch.J.) granting leave for appellant to file its initial brief instanter; and further, granting leave for appellant to file a 53 page brief. Notices mailed.	(sb)
	Brief for the appellants, received and filed. Notices mailed.	(sb)

DATE	FILINGS–PROCEEDINGS Filed
May 2	Motion filed. Order: (Bownes, J.) enlarging the time for appellee to file its brief to and including May 20, 1986. Notices mailed. (sb)
May 16	Motion filed. Order (Bownes, J.) enlarging the time for appellee to file its initial brief to and including May 28, 1986. Notices mailed. (lr)
May 20	Brief for Commonwealth of Pennsylvania amicus curiae, received and filed. (al)
May 30	Motions filed. Order: (Bownes, J.) granting leave for appellee to file a fifty-eight page brief instanter. Notices mailed. (sb)
	Brief for appellee, Commonwealth of Massachusetts, received and filed. (sb)
June 6	Letter Motion of amicus curiae, Comm. of Pennsylvania, to argue, received and filed. (al)
June 11	Motion filed. ORDER (Coffin, J.) enlarging the time for filing the reply brief for appellant and the deferred joint appendix to and including June 26, 1986. Notices mailed. (al)
June 19	ORDER (Campbell, Ch. J., Coffin, and Bownes, JJ) Treating the Commonwealth of Pennsylvania's June 3, 1986 letter as a motion for oral argument, the motion is denied. Notices mailed. (al)
June 27	Reply brief of the appellants received and filed. (lb)

DATE	FILINGS–PROCEEDINGS Filed
June 30	Brief for appellant in final form and deferred joint appendix in volumes I, II and III, received and filed by leave of court. (al)
July 9	Brief for plaintiff-appellee in final form, received and filed. (ms)
Sept. 29	Assigned for hearing at the October, 1986 session. (sb)
Oct. 8	Heard before Coffin, Breyer and Torruella, JJ. (sb)
Oct. 21	Motion For Leave To File Post-Argument Memorandum, received and filed. (ms).
March 31	ORDER (Coffin, Breyer and Torruella, JJ.) Upon consideration of appellant's motion to file a Post-Argument Memorandum, said motion is granted. Notices mailed. (al)
March 31	Secretary of Health and Human Service's Post Argument Memorandum, received and filed. (al)
March 31	JUDGMENT: The judgment of the district court is affirmed in part, vacated in part and the cause is remanded to the district court for further action consistent with the opinion filed this day. Each party to bear its own costs. Opinion of the Court by, Torruella, J. Notices mailed. (al)
April 10	Motion filed. ORDER: (Torruella, J.) enlarging the time for the Secretary of Health and Human Services to file a petition for rehearing or petition for re-

DATE	FILINGS–PROCEEDINGS Filed
	hearing with suggestion for rehearing en banc to and including May 14, 1987. Notices mailed. (ljr)
May 14	Petition For Rehearing With Suggestion For Rehearing En Banc of appellant, received and filed. (lr)
June 2	ORDER (Campbell, Ch. J., Coffin, Bownes, Breyer, Torruella and Selya, JJ.) denying the petition for rehearing and the suggestion for a rehearing en banc. Notices mailed. (al)
June 10	Mandate issued. Copy filed. Original papers returned to the district court. Notices mailed. (pm)
Dec. 17	Notice of certiorari to Supreme Court, received and filed. (cd)
1988	
Jan. 13	Notice of certiorari to the Supreme Court (December 2, 1987) SC# 87-929. (al)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-2523-G

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF,

v.

MARGARET HECKLER, ET AL., DEFENDANTS.

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
Aug. 26	1	Complaint, FILED. Summons ISSUED.
Oct. 28	2	ANSWER of the Deft, FILED. (w/admin. Record) (c/s)
	3	Certification of Video Tape Exhibit, FILED.
Nov. 8		*GARRITY, J.* PROCEDURAL ORDER ENTERED: Court will treat 2nd and 3rd Defense of Def't as constructive motions to dismiss. Deft to file by 12/05/83 memo of law in support of constructive motions. P to reply by 12/19/83, FILED. (cc/cl)
Dec. 6	4	Motion for Extension of Time for Defts to file Motions for S/J w/Memo to 12/30/83, FILED. (c/s)

DATE	NR	PROCEEDINGS
Dec. 29		*GARRITY, J.* re: #4 . . . ALLOWED (cb), FILED. (cc/cl)
Dec. 30	5	Defts' Memorandum Concerning Subject Matter Jurisdiction, FILED. (c/s)
1984		
Jan. 9	6	P's Memorandum Asserting District Court Jurisdiction to Review The Decision of the Grant Appeals Board, FILED (c/s)
Jan. 11	6A	*GARRITY, J.* ORDER ENTERED: In light of parties' memoranda, both defenses are ORDERED DENIED. In our opinion, we do have subject matter jurisdiction. Denial of the third defense is without prejudice to latter motions for summary judgment, FILED. (cc/cl)
May 18	7	Motion (Commonwealth of Pennsylvania) for leave to participate amicus curiae and leave for attorney's to appear and practice pro hac vice, filed with c/s.
Aug. 8		*GARRITY, J.* re: #7 . . . Motion DENIED– see Strasser v. Dooby, 1 Cir. 1970, 432 F.2d 567, 569, FILED. (cc/cl)
Nov. 1	8	P's Motion for Summary Judgment, FILED. (c/s)
	9	P's Memorandum in Support of Its Motion for Summary Judgment, FILED. (c/s)

DATE	NR	PROCEEDINGS
Nov. 23	10	Assented to Motion for Extension of Time to respond to P's Motion for S/J to 12/14/84, FILED.
Dec. 21	11	Motion for Ext. of Time to respond to P's Motion for S/J to 01/04/85, FILED. (assented to)
1985		
Jan 2	12	Assented to Motion for Extension of Time for Defts to respond to P's Motion for S/J to 01/25/85, FILED.
Jan 21	13	Assented to Motion for Extension of Time to 01/25/85 to respond to P's Motion for S/J, FILED.
Jan 25	14	Defts' Motion for S/J, FILED. (c/s)
	15	Memorandum in Support of Deft's Motion for S/J and in Oppos. to P's Motion for S/J, FILED. (c/s)
Feb. 7		*GARRITY, J.* re: #14 . . . NOTICE OF HEARING: Hear cross-motion for S/J on 03/04/85 at 3:00 p.m., FILED. (cc/cl)
Feb. 28	16	P's Motion to Continue Hearing (sched. for 03/04/85) FILED. (assented)
March 1		*GARRITY, J.* re: #16 . . . GRANTED–hearing continued to 03/18/85 at 2:30 p.m. FILED. (cc/cl)
March 18		*GARRITY, J.*–After hearing, cross-motions for S/J, TUA.

DATE	NR	PROCEEDINGS
May 21	17	Ltr. to J. Garrity from Thomas A. Barnico, Asst. Atty. Gen, re pending motion for S/J, FILED. (c/s)
June 3	18	Ltr. to J. Garrity from Ausa Green, FILED. (c/s)
Aug. 27	18A	*GARRITY, J.* MEMORANDUM AND ORDERS ON CROSS MOTIONS FOR SUMMARY JUDGMENT ENTERED: Commonwealth's Motion for S/J is Granted and Deft's Cross-Motion for Summary Judgment is Denied; counsel to stipulate and file a form of judgment as soon as practicable, FILED. (cc/cl, Full Pub.)
Oct. 7	18B	*GARRITY, J.* JUDGMENT ENTERED: Decision of HHS is REVERSED, FILED. (cc/cl)
Dec. 5	19	Deft's NOTICE OF APPEAL, FILED. (c/s)
Dec. 30	20	P's Opposition to Motion for Reconsideration, FILED. (c/s) (AUSA DID not file a Motion for Recon. in this case, but did in 85-2337-G)
1986		
Feb. 6		Certified copy of docket & original pleadings forward to court of appeals.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 85-2337-G

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF,

v.

MARGARET HECKLER, ET AL., DEFENDANTS.

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
June 5	1	Complaint, FILED. Summons ISSUED. (CFI)
July 9	2	ANSWER of Deft (w/Amin. Record), FILED. (c/s)
Aug. 28	2a	*GARRITY, J.* PROCEDURAL ORDER ENTERED: Court entered its memorandum and orders on cross-motions for S/J in the case CA No. 83-2523-G on 08/27/85 (attached). Defts in this case shall by 09/16/85 file any opposition to that memo and Order, w/memorandum; and if no opposition parties shall stipulate an appropriate form of judgment, FILED. (cc/cl)
Sept. 13	3	Motion for Extension of Time to 09/30/85 to respond to Procedural Order FILED. (plaintiff has assented)

DATE	NR	PROCEEDINGS
	4	Notice of Appearance of Andrew S. Hogeland as counsel for Defts, FILED. (c/s)
Sept. 30	5	Deft's Response to Procedural Order of August 28, 1985, FILED. (c/s)
Oct. 2		*GARRITY, J.* re: #5 . . . the procedure suggested herein is adopted; except that one week periods shall be enlarged to two weeks. According cross motions shall be filed on or before 10/16/85, FILED. (cc/cl)
Sept. 3	6	P's Reply to "Defts' Response to Procedural Order of 08/28/85," FILED. (c/s)
Sept. 17	7	Defts' Motion for S/J and Opposition to P's Motion for S/J, FILED. (c/s)
Sept. 18	8	P's Motion for Summary Judgment, FILED. (c/s)
Nov. 25	8a	*GARRITY, J.* MEMORANDUM AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT ENTERED, FILED. (cc/cl), Full Publication)
Dec. 2	8B	JUDGMENT ENTERED: Summary Judgment for Plaintiff, FILED. (cc/cl)
Dec. 12	9	Motion for Reconsideration, FILED. (c/s)

DATE	NR	PROCEEDINGS
Sept. 20	10	P's Opposition to Motion for Reconsideration, FILED. (c/s)
1986		
Jan. 24		*GARRITY, J.* RE: #9 . . . Upon consideration of this motion and P's opposition, motion is Ordered DENIED without hearing oral argument, FILED. (cc/cl)
Feb. 5	11	NOTICE OF APPEAL, FILED. (c/s)
Feb. 7		Certified copy of docket entries and original pleadings forwarded to the Court of Appeals.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES

CERTIFIED MAIL – RETURN RECEIPT
REQUESTED

Joseph P. Roman, Esquire
Legal Division, Room 611
Massachusetts Department of
Public Welfare
600 Washington Street
Boston, Massachusetts 02111

JUN 30, 1983

and

George Eng
Assistant Regional Attorney, Region I
John F. Kennedy Federal Building, Room 2407
Government Center
Boston, Massachusetts 02203

RE: Decision in the Appeal of Massachusetts
Department of Pubic Welfare
Docket No. 82-169
Decision No. [illegible]56
Dated: May 31, 1983

Dear Mr. Roman and Mr. Eng:

Enclosed is a copy of the decision of the Departmental Grant Appeals Board in the appeal identified above. The decision constitutes the final administrative action on this matter.

Sincerely yours

/s/ Neil H. Kaufman
Executive Secretary
Departmental Grant Appeals Board

Enclosure

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 83-2523-G

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF

v.

MARGARET HECKLER, ET AL. DEFENDANTS.

DEFENDANTS' MEMORANDUM CONCERNING SUBJECT MATTER JURISDICTION

INTRODUCTION

On August 30, 1983, the Commonwealth of Massachusetts filed an action seeking judicial review of a final decision of the Grant Appeals Board of the Department of Health and Human Services (HHS) which sustained the Health Care Financing Administration's (HCFA) disallowance of $6,414,964 in federal financial participation under the Medical Assistance Program (Medicaid) of the Social Security Act, 42 U.S.C.A. § 1396 *et seq.* (West Supp. 1982).

On October 28, 1983, defendants answered the complaint and asserted as an affirmative defense that this court lacks subject matter jurisdiction to review plaintiff's claims.*

* The answer raised two other affirmative defenses. First, defendants asserted that the Commonwealth failed to serve the complaint properly on the U.S. Attorney's office under Fed. R. Civ. P. 4. The defendants waive this defense because they did in fact receive the complaint, although improperly served. Second, the answer states that the complaint fails to state a claim upon which relief can be granted. The government prefers to deal with this defense in a later filed motion for summary judgment based on the administrative record.

As a matter of policy, HHS has decided not to press the defense of lack of jurisdiction in this action. However, because the First Circuit has recently stated that the jurisdiction of this Court is uncertain, defendants submit this memorandum to assist the Court in evaluating this question.

DISCUSSION

Title XIX of the Social Security Act, 42 U.S.C.A. § 1396 *et seq.* (West Supp. 1982), does not provide for judicial review of the Secretary's determination to disallow federal financial participation. Section 1316(d) provides:

> (d) Whenever the Secretary determines that any item or class of items on account of which Federal financial participation is claimed under subchapter I, VI, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, shall be disallowed for such participation, the State shall be entitled to and upon request shall receive a reconsideration of the disallowance.

The full text of Section 1316 is attached hereto. Indeed Section 1316 expressly provides for judicial review in the Court of Appeals for actions challenging the Secretary's determination that a state Medicaid plan does not *conform* with federal requirements but is distinctly silent on judicial review of *disallowances.*

In *Commonwealth of Massachusetts v. Departmental Grant Appeals Board of the United States Department of Health and Human Services,* 698 F.2d 22, 26 (1st Cir. 1983), the First Circuit stated that it was "uncertain" whether the Federal District Courts had jurisdiction to review a disallowance determination of the Secretary who has refused to participate in an unauthorized expenditure. *Id.* There, as here, the Secretary did not contest jurisdiction. However, the First Circuit stated: "Of course, the agreement of the parties will not confer jurisdiction if Congress has not done so [citation omitted] and we do not now decide whether it has." *Id.*

Various Federal Courts of Appeal have examined whether the federal district courts have subject matter jurisdiction to review disallowance determinations. The Ninth and Seventh Circuits have held such determinations judicially reviewable. *Illinois v. Schweiker,* 707 F.2d 273, 275-277 (7th Cir. 1983); *County of Alameda* v. *Weinberger,* 520 F.2d 344, 347-349 (9th Cir. 1975). The Eighth Circuit has held that the District Court has jurisdiction to grant prospective declaratory relief but that the Claims Court has exclusive jurisdiction under 28 U.S.C.A. § 1491 (West Supp. 1981) to review monetary claims in excess of $10,000 against the United States and its agencies. *State of Minnesota v. Heckler,* 718 F.2d 852, 857-858 (8th Cir. 1983). Here, although plaintiff seems to request prospective equitable relief, the action challenging a retroactive disallowance can be construed as one for monetary claims in excess of $10,000.

Finally, the Fifth Circuit has indicated, in dictum, that "the statutory history of section 1316(d) . . . indicates that the section's sponsors recommended against judicial review of disallowances." *State Department of Public Welfare v. Califano,* 556 F.2d 326, 329 n.4, 332 (5th Cir. 1977), *cert. denied,* 439 U.S. 818 (1978). It cites the following remarks of Senator Javits:

> Some States and local officials believe that some form of judicial review should encompass all respects of the public assistance programs, including matching issues or audit exceptions. However, the much greater concern is for review of decisions regarding plan-conformity issues. The Commission believes that to

involve audit exceptions or issues other than those of plan conformity in the judicial review process would create many additional problems.

Id. at 332. The Supreme Court has never decided the jurisdictional question.

CONCLUSION

This action raises two significant questions of subject matter jurisdiction. First, does this Court have jurisdiction under Section 1316 to review disallowance determination? Second, does this Court or the Claims Court have jurisdiction over plaintiff's claims, which can be construed as monetary claims over $10,000?

Respectfully submitted,

WILLIAM F. WELD
United States Attorney

By: /s/ Patti B. Saris
PATTIS B. SARIS
Assistant U.S. Attorney

DATE: December 29, 1983

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 83-2523-G

COMMONWEALTH OF MASSACHUSETTS, BY ITS DEPARTMENT OF PUBLIC WELFARE, PLAINTIFF

v.

MARGARET HECKLER, AS SHE IS SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

CAROLYN DAVIS, AS SHE IS ADMINISTRATOR OF THE HEALTH CARE FINANCING ADMINISTRATION OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

AND

NORVAL D. SETTLE, CECELIA SPARKS FORD, AND DONALD F. GARRETT, AS THEY CONSTITUTE THE DEPARTMENTAL GRANT APPEALS BOARD OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANTS

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, the plaintiff Commonwealth of Massachusett (the "Commonwealth") moves the Court to grant summary judgment in its favor and reverse the decision of the Department Grant Appeals Board of the Department of Health and Human Services.

As grounds for its motion the Commonwealth states that there is no dispute as to material facts and it is entitled to judgment as a matter of law. As further grounds for its

motion the Commonwealth relies on the arguments set forth in the memorandum filed herewith.

Pursuant to U.S. Dist. Ct. Local R. 12(c), the Commonwealth respectfully requests that the Court allow it twenty minutes for oral argument on its motion, at the Court's convenience.

By its attorneys,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

/s/ Thomas A. Barnico

THOMAS A. BARNICO
Assistant Attorney General
Department of the Attorney General
Government Bureau
One Ashburton Place, room 2019
Boston, Massachusetts 02108
617-727-1004

Date: November 13, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 84-2523-G

COMMONWEALTH OF MASSACHUSETTS, BY ITS DEPARTMENT OF PUBLIC WELFARE, PLAINTIFF

v.

MARGARET HECKLER, AS SHE IS SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

CAROLYN DAVIS, AS SHE IS ADMINISTRATOR OF THE HEALTH CARE FINANCING ADMINISTRATION OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

AND

NORVAL D. SETTLE, ALEXANDER G. TEITZ, AND DONALD F. GARRETT, AS THEY CONSTITUTE THE DEPARTMENTAL GRANT APPEALS BOARD OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANTS

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, the defendants hereby move the Court to grant summary judgment in their favor and enter an Order affirming the decision of the Department Grant Appeals Board of the Department of Health and Human Services in this action.

As grounds for their motion, defendants state that there is no dispute as to the material facts and they are entitled to judgment as a matter of law. As further grounds for their motion, defendants rely on the grounds stated in their Memorandum in Support of Defendants' Motion for

Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, incorporated herein and filed herewith.

Respectfully submitted,

WILLIAM F. WELD
United States Attorney

By: /s/ Karen F. Green

KAREN F. GREEN
Assistant U.S. Attorney
Room 1025A
J.W. McCormack Post Office and Courthouse
Boston, MA 02109
(617) 223-1755

DATED: January 25, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 85-2337-G

COMMONWEALTH OF MASSACHUSETTS, PLAINTIFF

v.

MARGARET HECKLER, ET AL. DEFENDANTS.

ANSWER

Defendants, Margaret Heckler, Carolyne Davis, Norval D. Settle, Judith Ballard, and Donald Garrett, hereby respond to the numbered paragraphs of plaintiff's Complaint as follows:

First Defense

1. Paragraph 1 contains plaintiff's characterization of this action and conclusions of law to which no response is required. To the extent a response is required, defendants deny that the $4,908,994 in federal financial participation referred to by plaintiff was due to it under the Medical Assistance Program (Medicaid) of the Social Security Act, 42 U.S.C. §§ 1396 *et seq*. Defendants also deny that any federal reimbursement has been wrongfully withheld.

2. Paragraph 2 contains conclusions of law to which no response is required.

3. Defendants admit the allegations contained in paragraphs 3 through 14 of the Complaint, but further state that the Administrative Record, filed herewith, speaks for itself.

4. Defendants deny the allegations contained in paragraphs 15(A) through (E) and 16.

Second Defense

Defendants' findings of facts are supported by substantial evidence in the administrative record, filed herewith, and are conclusive. Defendants' promulgation and interpretation of regulations are within the statutory framework and are proper.

Third Defense

Judgment should be entered for defendants dismissing the Complaint with prejudice and costs and the Secretary's decision should be affirmed.

Respectfully submitted,

WILLIAM F. WELD
United States Attorney

By: /s/ Karen F. Green
KAREN F. GREEN
Assistant U.S. Attorney
1107 J.W. McCormack POCH
Boston, MA 02109
617/223-0466

DATED: July 9, 1985

Supreme Court of the United States

No. 87-712

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

MASSACHUSETTS

ORDER ALLOWING CERTIORARI. Filed January 11, 1988.

The petition herein for a writ of certiorari to the *United States Court of Appeals for the First Circuit* is granted. This case is consolidated with 87-929, *Massachusetts* v. *Otis R. Bowen, Secretary of Health and Human Services, et al.*, and a total of one hour is allotted for oral argument.

Supreme Court of the United States

No. 87-929

MASSACHUSETTS, PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ORDER ALLOWING CERTIORARI. Filed January 11, 1988.

The petition herein for a writ of certiorari to the *United States Court of Appeals for the First Circuit* is granted. This case is consolidated with 87-712, *Otis R. Bowen, Secretary of Health and Human Services, et al.*, v. *Massachusetts*, and a total of one hour is allotted for oral argument.

U.S. GOVERNMENT PRINTING OFFICE: 1988— 202-037/60804

Supreme Court, U.S.
FILED
FEB 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-712 and 87-929

In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, CROSS-PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONERS/CROSS-RESPONDENTS

CHARLES FRIED
Solicitor General
JAMES M. SPEARS
Acting Assistant Attorney General
THOMAS W. MERRILL
Deputy Solicitor General
ROY T. ENGLERT, JR.
Assistant to the Solicitor General
WILLIAM KANTER
HOWARD S. SCHER
Attorneys
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Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the Administrative Procedure Act (APA), 5 U.S.C. (& Supp. IV) 551 *et seq.*, waives the sovereign immunity of the United States so as to allow an action in district court that seeks to "enjoin" the federal government to pay several million dollars to a state under a federal grant-in-aid program, or whether such an action must instead (in the absence of any specific waiver of sovereign immunity) be pursued in the United States Claims Court under the Tucker Act, 28 U.S.C. 1491.

2. If the APA does not waive the sovereign immunity of the United States for such a monetary action in district court, whether the district court may nevertheless split the case into two actions, with the district court retaining jurisdiction over claims for "prospective" relief that accompany, and are based on precisely the same legal theories as, the monetary claim that must be brought in the Claims Court.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, certain other officials of the Department of Health and Human Services were named as defendants in the district court and are petitioners/cross-respondents here: William L. Roper, M.D., Administrator of the Health Care Financing Administration; and Norval D. Settle, Judith A. Ballard, and Donald F. Garrett, members of the Departmental Grant Appeals Board.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutes involved	2
Statement	4
Summary of argument	9
Argument:	
The district court lacked jurisdiction over this lawsuit	11
I. This action can be maintained only in a court where the sovereign immunity of the United States has been waived	13
II. The Administrative Procedure Act does not waive the sovereign immunity of the United States for an action in district court seeking the payment of money allegedly due to the plaintiff under a federal grant-in-aid program	20
A. An action seeking allegedly past-due money under a federal grant-in-aid program is an action for "money damages," for which the Administrative Procedure Act does not waive sovereign immunity	21
1. An action seeking to "enjoin" a federal official to pay money or to "declare" that the federal government is liable to the plaintiff is an action for a money judgment	21
2. An action for a money judgment is an action for "money damages" within the meaning of the Administrative Procedure Act	24
B. Even if an action seeking money under a federal grant-in-aid program is not an action for "money damages," the Administrative Procedure Act is inapplicable because the Tucker Act provides an "adequate remedy in a court"	34

Argument – Continued: Page

III. A district court may not assert jurisdiction over an action seeking "prospective" declaratory or injunctive relief based on the same legal theories that underlie the plaintiff's Tucker Act claim for past-due money 36

A. Congress could not have intended to allow easy evasions of its conscious effort to centralize Tucker Act cases in the Claims Court and the Federal Circuit 38

B. The Administrative Procedure Act does not waive sovereign immunity for a "prospective" action because the Tucker Act provides an "adequate remedy in a court" 43

C. The Administrative Procedure Act does not waive sovereign immunity for a "prospective" action because the Tucker Act "impliedly forbids the relief which is sought" 44

Conclusion 47

TABLE OF AUTHORITIES

Cases:

Alabama Rural Fire Ins. Co. v. *Naylor*, 530 F.2d 1221 (5th Cir. 1976) 43

Alyeska Pipeline Service Co. v. *United States*, 688 F.2d 765 (Ct. Cl. 1982), cert. denied, 461 U.S. 943 (1983) ... 39

American Science & Eng'g, Inc. v. *Califano*, 571 F.2d 58 (1st Cir. 1978) 43

Amoco Prod. Co. v. *Hodel*, 815 F.2d 352 (5th Cir. 1987), petition for cert. pending, No. 87-372 .....22, 36, 40, 44

Army & Air Force Exchange Service v. *Sheehan*, 456 U.S. 728 (1982) 15, 19

Bakersfield City Sch. Dist. v. *Boyer*, 610 F.2d 621 (9th Cir. 1979) 23

Bender v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) 12-13

B.K. Instrument, Inc. v. *United States*, 715 F.2d 713 (2d Cir. 1983) 23

Cases – Continued: Page

Blassingame v. *Secretary of Navy*, 811 F.2d 65 (2d Cir. 1987) 15

Block v. *North Dakota*, 461 U.S. 273 (1983) 13, 16

Boruski v. *United States*, 493 F.2d 301 (2d Cir.), cert. denied, 419 U.S. 808 (1974) 39

Califano v. *Sanders*, 430 U.S. 99 (1977) 14

Carter v. *Seamans*, 411 F.2d 767 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970) 23, 36

Chabal v. *Reagan*, 822 F.2d 349 (3d Cir. 1987) 36

Chappell v. *Wallace*, 462 U.S. 296 (1983) 15

Chula Vista City Sch. Dist. v. *Bell*, 762 F.2d 762 (9th Cir. 1985), vacated, 474 U.S. 1098 (1986) 17, 22

Chula Vista City Sch. Dist. v. *Bennett*, 824 F.2d 1573 (Fed. Cir. 1987), cert. denied, No. 87-909 (Jan. 25, 1988) 17, 22

Congress of Racial Equality v. *Social Security Administration*, 270 F. Supp. 537 (D. Md. 1967) 33

Connecticut Dep't of Income Maintenance v. *Heckler*, 471 U.S. 524 (1985) 4

Cook v. *Arentzen*, 582 F.2d 870 (4th Cir. 1978) 36, 44

Denton v. *Schlesinger*, 605 F.2d 484 (9th Cir. 1979) 36

Dermott Special Sch. Dist. v. *Gardner*, 278 F. Supp. 687 (E.D. Ark. 1968) 33

Dugan v. *Rank*, 372 U.S. 609 (1963) 13

Eastport S.S. Corp. v. *United States*, 372 F.2d 1002 (Ct. Cl. 1967) 6, 17, 19

Edelman v. *Jordan*, 415 U.S. 651 (1974) 23

Fidelity Constr. Co. v. *United States*, 700 F.2d 1379 (Fed. Cir.), cert. denied, 464 U.S. 826 (1983) 19

Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962) 19, 26, 38-39

Green v. *Mansour*, 474 U.S. 64 (1985) 42

Hawaii v. *Gordon*, 373 U.S. 57 (1963) 13

Hahn v. *United States*, 757 F.2d 581 (3d Cir. 1985) 22

Heisig v. *United States*, 719 F.2d 1153 (Fed. Cir. 1983) 15

Hohri v. *United States*, 586 F. Supp. 769 (D.D.C. 1984), aff'd in part and rev'd in part, 782 F.2d 227 (D.C. Cir. 1986), vacated, No. 86-510 (June 1, 1987) 15, 19, 37, 38, 41

Hondros v. *Civil Serv. Comm'n*, 720 F.2d 278 (3d Cir. 1983) 41

Cases—Continued: Page

Hoopa Valley Tribe v. *United States*, 596 F.2d 435 (Ct. Cl. 1979) 18, 23
Insurance Corp. of Ireland v. *Compagnie des Bauxites de Guinée*, 456 U.S. 694 (1982) 13
International Eng'g Co. v. *Richardson*, 512 F.2d 573 (D.C. Cir. 1975), cert. denied, 423 U.S. 1048 (1976) ... 43
Keller v. *MSPB*, 679 F.2d 220 (11th Cir. 1982) 36
Larionoff v. *United States*, 533 F.2d 1167 (D.C. Cir. 1976), aff'd, 431 U.S. 864 (1977) 19
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) 13, 26, 28
Lee v. *Thornton*, 420 U.S. 139 (1975) 20
Lee County Sch. Dist. No. 1 v. *Gardner*, 363 F. Supp. 26 (D.S.C. 1967) 33, 34
Library of Congress v. *Shaw*, No. 85-54 (July 1, 1986) ... 16
Maier v. *Orr*, 754 F.2d 973 (Fed. Cir. 1985) 18, 22
Maryland Dep't of Human Resources v. *Department of Health & Human Services*, 763 F.2d 1441 (D.C. Cir. 1985) 10, 13, 17-18, 20, 24-25, 26, 32
Massachusetts v. *Departmental Grant Appeals Bd.*, 815 F.2d 778 (1st Cir. 1987) 7, 8, 26, 37
Matthews v. *United States*, 810 F.2d 109 (6th Cir. 1987) .. 36
Minnesota v. *United States*, 305 U.S. 382 (1939) 14
Minnesota ex rel. Noot v. *Heckler*, 718 F.2d 852 (8th Cir. 1983) 22-23, 26, 36
Montana v. *United States*, 440 U.S. 147 (1979) 45
New Mexico v. *Regan*, 745 F.2d 1318 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985) 26, 36
North Side Lumber Co. v. *Block*, 753 F.2d 1482 (9th Cir.), cert. denied, 474 U.S. 931 (1985) 43, 45
Oliveira v. *United States*, 827 F.2d 735 (Fed. Cir. 1987) .. 37
Pennhurst State Sch. & Hosp. v. *Halderman*, 465 U.S. 89 (1984) 13
Portsmouth Redevel. & Hous. Auth. v. *Pierce*, 706 F.2d 471 (4th Cir.), cert. denied, 464 U.S. 960 (1983) 23, 36, 40
Ramirez de Arellano v. *Weinberger*, 724 F.2d 143 (1983), rev'd, 745 F.2d 1500 (D.C. Cir. 1984), vacated, 471 U.S. 1113 (1985) 37, 45
Richardson v. *Morris*, 409 U.S. 464 (1973) 19, 45-46
Rowe v. *United States*, 633 F.2d 799 (9th Cir. 1980), cert. denied, 451 U.S. 970 (1981) 36, 45

Cases—Continued: Page

Sarasota v. *EPA*, 799 F.2d 674 (11th Cir. 1986) 18
Sharp v. *Weinberger*, 798 F.2d 1521 (D.C. Cir. 1986) 43, 45
Shaw v. *Gwatney*, 795 F.2d 1351 (8th Cir. 1986) 36
Smith v. *United States*:
654 F.2d 50 (Ct. Cl. 1981) 36, 41
823 F.2d 532 (Fed. Cir. 1987) 41
South Corp. v. *United States*, 690 F.2d 1368 (Fed. Cir. 1982) 14
Spectrum Leasing Corp. v. *United States*, 764 F.2d 891 (D.C. Cir. 1985) 45
State Dep't of Pub. Welfare v. *Califano*, 556 F.2d 326 (5th Cir. 1977), cert. denied, 439 U.S. 818 (1978) 6
Tennessee ex rel. Leech v. *Dole*, 749 F.2d 331 (6th Cir. 1984), cert. denied, 472 U.S. 1018 (1985) 22
United States v. *Alire*, 73 U.S. (6 Wall.) 573 (1867) 19
United States v. *City of Kansas City*, 761 F.2d 605 (10th Cir. 1985) 22
United States v. *Corrick*, 298 U.S. 435 (1936) 13
United States v. *Fausto*, No. 86-595 (Jan. 25, 1988) ... 15, 38, 40
United States v. *Jones*, 131 U.S. 1 (1889) 19
United States v. *Jones*, 336 U.S. 641 (1949) 19
United States v. *King*, 395 U.S. 1 (1969) 19, 32, 46
United States v. *Mendoza*, 464 U.S. 154 (1984) 46
United States v. *Mitchell*, 463 U.S. 206 (1983) 13, 14, 15, 16, 17
United States v. *Mottaz*, 476 U.S. 834 (1986) 14, 16
United States v. *Shaw*, 309 U.S. 495 (1940) 41
United States v. *Sherwood*, 312 U.S. 584 (1941) 16, 19
United States v. *Stauffer Chem. Co.*, 464 U.S. 165 (1984) 45
United States v. *Testan*, 424 U.S. 392 (1976) 6, 19, 20, 25, 32
Van Drasek v. *Lehman*, 762 F.2d 1065 (D.C. Cir. 1985) .. 22
Warner v. *Cox*, 487 F.2d 1301 (5th Cir. 1974) 43, 44
Williams v. *Secretary of the Navy*, 787 F.2d 552 (Fed. Cir. 1986) 18
Wronke v. *Marsh*, 767 F.2d 354 (7th Cir. 1985), cert. denied, No. 86-193 (Oct. 6, 1986) 22

Constitution, statutes, regulation and rule: Page

U.S. Const.:
Art. I 14
Art. III 14
Amend. XI 23, 42

Administrative Procedure Act, 5 U.S.C. (& Supp. IV) 551 *et seq.*:
5 U.S.C. 571-576 27
5 U.S.C. (Supp. IV) 702 (§ 10(a)) ..... *passim*
5 U.S.C. (Supp. IV) 702(2) 28, 43, 45
5 U.S.C. 704 ..... 3, 11, 16, 28, 35, 43, 44, 45

Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 14
28 U.S.C. 1295(a)(2) 15, 40
28 U.S.C. 1295(a)(3) 14
28 U.S.C. 1631 ..... 12, 47

Social Security Act, 42 U.S.C. (& Supp. III) 301 *et seq.*:
Tit. II, 42 U.S.C. (& Supp. III) 401 *et seq.*:
§ 205(g), 42 U.S.C. 405(g) 38
Tit. XI, 42 U.S.C. (& Supp. III) 1301 *et seq.*:
§ 1116(a)(3), 42 U.S.C. (Supp. III) 1316(a)(3) .. 6
§ 1116(d), 42 U.S.C. (Supp. III) 1316(d) 6
Tit. XVIII, 42 U.S.C. (& Supp. III) 1395 *et seq.*:
§ 1878(f), 42 U.S.C. (& Supp. III) 1395*oo*(f) ... 38
Tit. XIX, 42 U.S.C. (& Supp. III) 1396-1396q 4, 6
§ 1903(a), 42 U.S.C. 1396b(a) 5, 6, 17
§ 1905(a)(15), 42 U.S.C. (& Supp. III) 1396d(a)(15) 4
§ 1905(d), 42 U.S.C. (& Supp. III) 1396d(d) 4
Tit. XX, 42 U.S.C. (& Supp. III) 1397 *et seq.* 25
§ 2002, 42 U.S.C. (& Supp. III) 1397a 25

Tucker Act:
28 U.S.C. 1346(a) 3
28 U.S.C. 1346(a)(2) 3, 15
28 U.S.C. 1491 ..... 4, 8
28 U.S.C. 1491(a) 3
28 U.S.C. 1491(a)(1) 3, 15
28 U.S.C. 1491(a)(2) 3-4, 20, 44, 45
28 U.S.C. 1491(a)(3) 20

Statutes, regulation and rule—Continued: Page

Pub. L. No. 94-574, § 1, 90 Stat. 2721 14
28 U.S.C. 1331 14
28 U.S.C. 1500 42
42 U.S.C. 2000e-16 38
42 C.F.R. 441.13(b) 5
Fed. R. Civ. P. 12(h)(3) 13

Miscellaneous:

Administrative Procedure Act Amendments of 1976: Hearings on S. 796, S. 797, S. 798, S. 799, S. 800, S. 1210, S. 1289, S. 2407, S. 2408, S. 2715, S. 2792, C. 3123, S. 3296, and S. 3297 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. (1976) 27-28

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Miscellaneous – Continued: Page

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Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. (1970) 27, 28, 29-30, 33, 43

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-712

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS

No. 87-929

COMMONWEALTH OF MASSACHUSETTS, CROSS-PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONERS/CROSS-RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a)[1] is reported at 816 F.2d 796. One opinion of the district court (Pet. App. 17a-31a) is reported at 616 F. Supp. 687. The other opinion of the district court (Pet. App. 33a-35a) is reported at 622 F. Supp. 266. The orders of the district court respecting jurisdiction (Pet. App. 37a-38a) are unreported. Decisions No. 638 and No. 438 of the Departmental Grant Appeals Board of the Department of Health and Human Services (Pet. App. 39a-52a, 53a-84a) are unreported.

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[1] "Pet. App." refers to the appendix to the petition in No. 87-712.

JURISDICTION

The judgments of the court of appeals (Pet. App. 85a, 86a) were entered on March 31, 1987. A petition for rehearing was denied on June 2, 1987 (Pet. App. 87a-88a). On August 19, 1987, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including September 30, 1987. On September 22, 1987, Justice Brennan further extended the time for filing a petition for a writ of certiorari to and including October 30, 1987, and the petition was filed on that date. The Commonwealth's cross-petition for a writ of certiorari was filed on December 2, 1987. The petition and the cross-petition were granted on January 11, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

5 U.S.C. (Supp. IV) 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants

> consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. 704 provides in pertinent part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.
> * * *.

28 U.S.C. 1346(a) provides in pertinent part:

> The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:
>
> * * * * *
>
> (2) Any * * * civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort * * *.

28 U.S.C. 1491(a) provides in pertinent part:

> (1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * *.
>
> (2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand

appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.* * *.

* * * * *

STATEMENT

This action arises out of a dispute between petitioners and respondent over whether certain expenditures incurred by respondent in providing services at intermediate care facilities for the mentally retarded were properly reimbursable under the Medicaid program.[2] Respondent filed suit in the United States District Court for the District of Massachusetts, asking that court to "[e]njoin the Secretary and the Administrator from failing or refusing to reimburse the Commonwealth" for the disputed expenditures (Pet. App. 93a, 98a). The court of appeals found that this action presented both a "retrospective" claim for money damages against the United States, and a "prospective" claim for declaratory and injunctive relief (*id.* at 4a). The court concluded that under the Tucker Act, 28 U.S.C. 1491, the United States Claims Court had exclusive jurisdiction over the retrospective part of the suit. The court held, however, that the district court also had jurisdiction insofar as the complaint sought prospective relief. Accordingly, the court reached the merits of the legal dispute between the parties, which it resolved in favor of respondent.

1. During the period 1978-1982, respondent received several hundred million dollars from the federal government in partial reimbursement for its costs in providing services at intermediate care facilities for the mentally retarded (ICFs/MR). ICFs/MR are generally eligible for reimbursement under Section 1905(a)(15) and (d) of the Medicaid statute, 42 U.S.C. (& Supp. III) 1396d(a)(15) and (d).[3] The obligation of petitioner Secretary

[2] In this brief we use "petitioners" to refer to petitioners/cross-respondents (*i.e.*, the federal parties) and "respondent" to refer to respondent/cross-petitioner the Commonwealth of Massachusetts.

[3] The Medicaid statute is Title XIX of the Social Security Act, 42 U.S.C. (& Supp. III) 1396-1396q. See *Connecticut Dep't of Income Maintenance* v. *Heckler*, 471 U.S. 524, 528-529 (1985).

of Health and Human Services (the Secretary) to reimburse states with approved Medicaid plans (such as respondent) for eligible expenditures is stated affirmatively in Section 1903(a) of the statute. See 42 U.S.C. 1396b(a) (emphasis added) ("the Secretary (except as otherwise provided in this section) *shall pay* to each State which has a plan approved under this subchapter" amounts specified by a detailed statutory formula).

The statute, however, limits reimbursable services at ICFs/MR in several important ways, as described in our petition (at 4-6). To implement the statutory limitations, the Secretary has adopted a regulation providing that payments to ICFs/MR "may not include reimbursement for vocational training and educational activities" (42 C.F.R. 441.13(b)).

On two separate audits, which covered the years 1978-1982, auditors from the U.S. Department of Health and Human Services (HHS) determined that respondent had included among the costs for which it had obtained Medicaid reimbursement various "special education" services provided to residents at ICFs/MR by the Massachusetts Department of Education (MDOE). Because the auditors viewed the services in question as unreimbursable under the Medicaid statute and regulations, HHS disallowed $6,414,964 in federal financial participation for the period from July 1, 1978, to December 31, 1980, and $4,908,994 for the period January 1, 1981, to June 30, 1982 (see Pet. App. 17a, 34a). Respondent appealed to the Departmental Grant Appeals Board (GAB) of HHS, which upheld both disallowances (*id.* at 39a-52a, 53a-84a). The disallowed amounts have since been recouped by HHS by withholding a portion of certain advance reimbursements given to respondent for Medicaid expenses in years subsequent to the audit years.

2. In response to the GAB decisions, respondent filed two complaints in federal district court. Each complaint sought "judicial review of a final decision of the [GAB], which sustained the * * * disallowance of [a specified monetary amount] in federal financial participation due to the Commonwealth of Massachusetts" (Pet. App. 89a-90a, 95-96a). Under the heading "Requests for Relief," each complaint prayed that the court "[e]njoin the [defendants] from failing or refusing to reimburse

the Commonwealth, or from recovering from the Commonwealth, the federal share of expenditures for medical assistance to eligible residents of intermediate care facilities for the mentally retarded during the period in question" (*id.* at 93a, 98a).

Petitioners raised the defense of lack of subject-matter jurisdiction in their answer and were directed by the district court to brief that issue (see Pet. App. 37a). In a responsive memorandum filed on December 29, 1983, petitioners stated that, "[a]s a matter of policy, HHS has decided not to press the defense of lack of jurisdiction in this action" (J.A. 20). Nevertheless, petitioners went on to observe that "[t]his action raises two significant questions of subject matter jurisdiction" (J.A. 22). One of those questions was "does this Court or the Claims Court have jurisdiction over plaintiff's claims, which can be construed as monetary claims over $10,000?" (*ibid.*).[4]

The district court did not address the substance of the jurisdictional issues to which petitioners had alerted the court.

[4] The other question raised in our memorandum was whether Medicaid disallowance determinations are judicially reviewable at all. A specific provision of the Social Security Act (42 U.S.C. (Supp. III) 1316(d)) permits the Secretary to disallow particular items for which a state claims reimbursement under Title XIX (Medicaid) of the Act, but no provision of the Social Security Act provides for judicial review of the Secretary's disallowance determinations. The absence of any specific judicial review provision, expecially when contrasted with the judicial review provision that *does* exist within the same section (42 U.S.C. (Supp. III) 1316(a)(3)), might be read to preclude judicial review, and there is legislative history to support the view that no judicial review of disallowance determinations was intended. See generally *State Dep't of Pub. Welfare* v. *Califano*, 556 F.2d 326, 329 n.4, 332 (5th Cir. 1977), cert. denied, 439 U.S. 818 (1978). Nevertheless, the explicit requirement of 42 U.S.C. 1396b(a) that the Secretary "shall pay" the states amounts that are determined in accordance with the statute constitutes, we believe, a "federal statute [that] 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " *United States* v. *Testan*, 424 U.S. 392, 400 (1976) (quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). Accordingly, it is petitioners' position that a state may contest a disallowance by seeking compensation under the Tucker Act, and that disallowance decisions are to that extent judicially reviewable. As we make clear in the remainder of this brief, however, it is also our position that *only* the Tucker Act – and not the Administrative Procedure Act – authorizes judicial review of disallowance decisions.

Rather, on January 11, 1984, the district court held in an unelaborated, handwritten order that it had jurisdiction (Pet. App. 38a). Subsequently, on August 27, 1985, the court issued an opinion granting summary judgment to respondent and overturning the GAB's first disallowance determination in its entirety (*id.* at 17a-31a). The court entered judgment on October 7, 1985, in which it "ordered and adjudged that the decision of the [GAB] which disallowed reimbursement to the Commonwealth of Massachusetts the sum of $6,414,964 in federal financial participation under the Medicaid program, 42 U.S.C. §§ 1396 *et seq.*, is reversed" (*id.* at 32a). Because respondent's second complaint raised the same legal issues as the first complaint, the district court likewise entered a memorandum and order and corresponding judgment holding for respondent on that complaint on November 25, 1985, and December 2, 1985 (*id.* at 33a-36a).

3. Petitioners appealed to the United States Court of Appeals for the First Circuit and argued, among other things, that the district court had impermissibly entered a money judgment that only the United States Claims Court, under the Tucker Act, had the power to render. The court of appeals agreed with petitioners that respondent's lawsuits sought money judgments against the United States and that, to this extent, they had been improperly brought in district court. In so holding, the court of appeals reiterated, in abbreviated form, the reasoning of its decision one day earlier in *Massachusetts* v. *Departmental Grant Appeals Bd.*, 815 F.2d 778 (1st Cir. 1987). The court recognized that no suit against the United States for any form of relief may be maintained in the absence of a waiver of sovereign immunity. The court further acknowledged that Section 10(a) of the Administrative Procedure Act (APA), 5 U.S.C. (Supp. IV) 702, permits only "action[s] * * * seeking relief other than money damages." Accordingly, the court held: "The district

disallowance decisions are to that extent judicially reviewable. As we make clear in the remainder of this brief, however, it is our position that *only* the Tucker Act – and not the Administrative Procedure Act – authorizes judicial review of disallowance decisions.

court may not * * * consider the claim for money past due. That claim is one for 'money damages' * * *." Pet. App. 5a. Insofar as a plaintiff sought to recover past-due money from the federal government, the court of appeals concluded, its sole remedy lay in the Claims Court under the Tucker Act, 28 U.S.C. 1491 (Pet. App. 5a).

Nevertheless, the court went on to hold that this did not mean the entire action had to be litigated in the Claims Court. The court reasoned that as long as "a grant-in-aid dispute concerns a legal question that has a significant, prospective effect on the ongoing relationship between the federal agency and the affected state"—in other words, as long as a dispute will affect the amount of money due in the future as well as the amount of money (if any) past due—"the Administrative Procedure Act grants the district court jurisdiction to provide injunctive and declaratory relief" (Pet. App. 5a). Indeed, the court thought that such an action should proceed in district court in all but "the unusual situation in which the disallowance decision had no significant prospective effect [and] the challenge *only* concerned the money allegedly past due" (*id.* at 4a).[5] The court accordingly held that the district court had properly reached the merits, except insofar as specific services rendered in the past were concerned (see *id.* at 7a & n.2). Significantly, the court added (*id.* at 6a):

> Should the Secretary persist in withholding reimbursement for reasons inconsistent with our decision, the Commonwealth's remedy would be a suit for money past due under the Tucker Act in the Claims Court. In that subsequent suit we assume that the Secretary would be collaterally estopped from raising issues decided here.

On the merits, the court held that petitioners, in determining that services provided by the MDOE were nonreimbursable under Medicaid, had misconstrued the statute. Finding that

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[5] The decision announced one day earlier, *Departmental Grant Appeals Board*, had been such a challenge, because it concerned only services rendered in the past pursuant to a court order that was no longer in effect. Judge Coffin regarded that case as "a rare if not a unique one" (815 F.2d at 789 (concurring opinion)), foreshadowing the suggestion of the court a day later in the present case that it would be highly unusual for a case *not* to be bifurcated into a Tucker Act challenge to disallowance of money allegedly past due and a "prospective" case that could proceed in district court.

"medical" and "educational" services are not necessarily mutually exclusive, the court took the view that "the Secretary [must] develop a Medicaid audit procedure that looks behind the state statutory label 'special education' " to determine whether services are in fact reimbursable as either "medical assistance" or "rehabilitation" services (Pet. App. 16a).

SUMMARY OF ARGUMENT

I. The issues raised in our petition and respondent's cross-petition turn on the interpretation of the general waivers of sovereign immunity found in two statutes: the Administrative Procedure Act (APA) and the Tucker Act. It is undisputed that sovereign immunity has been waived in this case. The dispute turns on which of these statutes supplies the relevant waiver and over what issues. The court of appeals held that insofar as respondent's complaints seek prospective relief—an injunction or a declaratory judgment—the APA supplies the required waiver of sovereign immunity, but that insofar as the complaints seek retrospective relief—money damages—the only applicable waiver of sovereign immunity is that contained in the Tucker Act. Thus, the court of appeals split the case into two actions: an action seeking prospective relief, which could proceed in the district court and regional court of appeals, and an action seeking money damages in excess of $10,000, which under the Tucker Act could proceed only in the Claims Court and the Federal Circuit. Respondent disagrees. In its view, the APA's waiver of sovereign immunity is broad enough to encompass both its claims for prospective relief and its claims for past-due money from the United States. According to respondent, therefore, the entire action could be entertained in the district court. It is our position that respondent's complaint clearly states a claim for money damages, and that the only applicable

waiver of sovereign immunity for such a claim is found in the Tucker Act. Furthermore, given that an action brought in the Claims Court under the Tucker Act will afford respondent an adequate remedy, and given the undesirability of the claim splitting endorsed by the court of appeals, we believe that the entire case should be adjudicated in the Claims Court and the Federal Circuit.

In resolving these jurisdictional questions, the Court should look to three especially relevant provisions of the APA: its limitation to "relief other than money damages"; its prohibition on granting relief that is expressly or impliedly forbidden by another statute; and its limitation to cases in which there is no other adequate remedy in a court. The Tucker Act also has special limitations that are relevant to this case, in particular its remedial limitations and its limitation to cases in which the Act of Congress can fairly be interpreted as implying a right to compensation. But those limitations are met in this case, in which respondent seeks monetary relief and relies on a provision of the Medicaid statute that requires the Secretary to pay states money in accordance with the statute.

II. The court of appeals correctly held that respondents' complaints seek money judgments for which the only applicable waiver of sovereign immunity is the Tucker Act, not the APA. The waiver of sovereign immunity in the APA applies only to "[a]n action in a court of the United States *seeking relief other than money damages*" (5 U.S.C. (Supp. IV) 702 (emphasis added)). Although respondents framed their complaints so as not to seek a money judgment in so many words, it is well established that such a formalistic device as seeking an "injunction" to pay money will not suffice – for either APA purposes or Tucker Act purposes – to convert an attempt to compel the payment of money into something other than a request for a money judgment. Nor is there merit to the theory, which has been adopted by the D.C. Circuit in *Maryland Dep't of Human Resources* v. *Department of Health & Human Services*, 763 F.2d 1441 (1985), that there exists a peculiar species of money judgments that can be granted under the APA notwithstanding that statute's exclusion of "money damages." The legislative history of the 1976

amendments to the APA, which added the waiver of sovereign immunity to the statute, shows that Congress intended to distinguish all monetary remedies from all nonmonetary remedies, not to distinguish "money damages" (which cannot be awarded under the APA) from some other kind of monetary relief. Respondent thus sought "money damages." Moreover, even if respondent did not seek "money damages," its Tucker Act remedy nevertheless is an "adequate remedy in a court" that precludes an action for past-due money under the APA (5 U.S.C. 704).

III. The court of appeals erred, however, by holding that the district court had properly exercised jurisdiction over respondent's requests for "prospective" declaratory or injunctive relief. Once it is determined that a case *includes* a Tucker Act claim for more than $10,000, over which the jurisdiction of the Claims Court is exclusive, the entire case should be decided by the Claims Court. This rule stems from three factors. First, claim splitting has the general effect of circumventing Congress's careful scheme to centralize monetary claims in the Claims Court and Federal Circuit and creates serious practical problems. There is no indication that Congress intended to permit such a result. Second, the APA's prohibition on the exercise of jurisdiction when there is another adequate remedy in a court affirmatively precludes claim splitting, at least in cases like this one where the Tucker Act remedy is fully adequate. Third, the APA's prohibition on the exercise of jurisdiction when another statute expressly or impliedly forbids the relief sought suggests that any remedial limitations that may exist in the Tucker Act counsel against granting additional remedies in district court, and therefore counsel against claim splitting.

ARGUMENT

THE DISTRICT COURT LACKED JURISDICTION OVER THIS LAWSUIT

Neither party before this Court agrees with the resolution of the jurisdictional issues in this case by the court of appeals. Respondent contends that the court of appeals erred insofar as

it interpreted respondent's complaints as at least in part stating a cause of action for "money damages" excluded from the APA's coverage by 5 U.S.C. (Supp. IV) 702 and subject instead to the exclusive jurisdiction of the Claims Court under the Tucker Act. If respondent is right, then the district court had jurisdiction over this entire lawsuit, and the court of appeals erred in vacating part of the judgment of the district court on jurisdictional grounds.[6] We, on the other hand, agree with the court's holding that respondent impermissibly sought money damages from the United States in federal district court. Our quarrel with the decision below is its holding that the district court could nevertheless determine the merits of this dispute through the device of claim splitting. In our view, the district court lacked jurisdiction altogether, and the court of appeals should have vacated its judgment and directed transfer of this action, in its entirety, to the Claims Court under 28 U.S.C. 1631.

Both respondent's jurisdictional contentions and ours require an understanding of two statutes that contain general waivers of the sovereign immunity of the United States—the APA and the Tucker Act. We first discuss those statutes and the limitations that Congress has placed in them. We then show that respondent's request that petitioners be "enjoined" from failing to pay respondent allegedly past-due money is not cognizable in district court under the APA. Finally, we show that the court of appeals erred by splitting the cases into two actions and taking jurisdiction over the requests for prospective relief found in respondent's complaints.[7]

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[6] Even if respondent's position on jurisdiction prevails, however, that portion of the judgment could not simply be reinstated because the court of appeals also held that the record was inadequate to suport it (Pet. App. 7a n.2).

[7] The issue of the district court's jurisdiction is properly before this Court even though the government did not press the defense of lack of subject-matter jurisdiction in the district court. It is well established that an appellate court is obliged to consider, as a threshold question, the existence of subject-matter jurisdiction, both its own and that of the lower court. *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). When a lower court lacks subject-matter jurisdiction, the appellate court is bound to notice the defect even if it is not raised by the parties; in that event, it has "jurisdiction

I. This Action Can Be Maintained Only in a Court Where the Sovereign Immunity of the United States Has Been Waived

As respondent has recognized (see, *e.g.*, Pet. App. 90a, 96a; 87-929 Cross-Pet. 8), a waiver of sovereign immunity is a jurisdictional prerequisite to the maintenance of this lawsuit. It is "axiomatic" that the United States cannot be sued without its consent. *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). Furthermore, "[t]he States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress." *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983). Finally, there is no doubt that this lawsuit, although it named as defendants officials of the Department of Health and Human Services rather than the United States itself, is in substance an action against the sovereign that can proceed only in accordance with the terms of a waiver of sovereign immunity.[8]

Although it is undisputed that sovereign immunity *has* been waived in this case—and that respondent is entitled to judicial resolution of the merits of its claim that the educational services in question are reimbursable under the Medicaid statute—the source of the applicable waiver of sovereign immunity is very much in contention. Respondent maintains that the general waiver of sovereign immunity contained in the APA applies,

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on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.' " *Ibid.* (quoting *United States* v. *Corrick*, 298 U.S. 435, 440 (1936)). For these reasons (see also Fed. R. Civ. P. 12(h)(3); *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinée*, 456 U.S. 694, 702 (1982)), the court of appeals correctly determined that it should address the jurisdictional questions in this case, and those issues are likewise properly before this Court.

[8] See, *e.g.*, *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963); *Dugan* v. *Rank*, 372 U.S. 609, 620-621 (1963); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11, 700-704 (1949); see also *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 109-112 & nn.21-22 (1984). But cf. *Maryland Dep't of Human Resources* v. *Department of Health & Human Services*, 763 F.2d 1441, 1448 n.2 (D.C. Cir. 1985) (raising but not deciding question whether action similar to this one required a waiver of sovereign immunity or could instead be brought as an "officer's suit" against HHS officials).

and that this action was properly brought in the district court. We maintain that the only applicable waiver of sovereign immunity is that found in the Tucker Act and that the action could only be brought in the United States Claims Court.[9] See *Minnesota* v. *United States*, 305 U.S. 382, 388 (1939) ("[I]t rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought."); *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986) ("When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction.").

As respondent correctly observed in its complaints, "[n]o special statutory form of proceeding" exists for actions such as these (Pet. App. 90a, 96a). Thus, the only possible source of a waiver of sovereign immunity in this case is one of two statutes that contain *general* waivers of sovereign immunity: the APA and the Tucker Act. The waiver of sovereign immunity contained in the APA, 5 U.S.C. (Supp. IV) 702, was added to that statute in 1976. See generally Pub. L. No. 94-574, § 1, 90 Stat. 2721; H.R. Rep. 94-1656, 94th Cong., 2d Sess. 4-13 (1976); S. Rep. 94-996, 94th Cong., 2d Sess. 3-12 (1976). It permits an action in any "court of the United States," including, of course, the United States District Court for the District of Massachusetts.[10] The

[9] The Claims Court is an Article I tribunal, created by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, that exercises the trial jurisdiction formerly assigned to the United States Court of Claims. See *United States* v. *Mitchell*, 463 U.S. at 228 n.33. Its decisions are appealable under 28 U.S.C. 1295(a)(3) to the United States Court of Appeals for the Federal Circuit, an Article III tribunal created in the same 1982 Act via a merger of the old Court of Claims and the Court of Customs and Patent Appeals. Decisions of the former Court of Claims are binding precedent in the Federal Circuit. *South Corp.* v. *United States*, 690 F.2d 1368, 1370-1371 (Fed. Cir. 1982) (en banc).

[10] The APA is only a waiver of sovereign immunity and does not by itself confer subject-matter jurisdiction on any court. *Califano* v. *Sanders*, 430 U.S. 99 (1977). When APA review is otherwise proper in district court, however, 28 U.S.C. 1331 provides the jurisdictional base of the suit. *Sanders*, 430 U.S. at 105-107. The Tucker Act, by contrast, is both a waiver of sovereign immunity and a jurisdiction-conferring provision. *United States* v. *Mitchell*, 463 U.S. at 212.

waiver of sovereign immunity contained in the Tucker Act, by contrast, confers jurisdiction exclusively on the United States Claims Court when the claims exceed $10,000 in amount. Compare 28 U.S.C. 1491(a)(1) (jurisdiction of Claims Court) with 28 U.S.C. 1346(a)(2) (concurrent jurisdiction of district courts over claims for $10,000 or less). See generally *United States* v. *Hohri*, No. 86-510 (June 1, 1987), slip op. 1-2 n.1; *United States* v. *Mitchell*, 463 U.S. at 212 n.10; *Army & Air Force Exchange Service* v. *Sheehan*, 456 U.S. 728, 734-725 n.5 (1982). The amounts at issue in this case far exceed $10,000.[11] It is therefore clear that the district court properly exercised jurisdiction over this case, either in whole or in part, only if the APA's waiver of sovereign immunity applies.

The APA conditions its waiver of sovereign immunity in three important ways. See generally Jacoby, *Roads to the Demise of the Doctrine of Sovereign Immunity*, 29 Admin. L. Rev. 265, 270-271 (1977). First, Section 702 itself, in the very sentence that waives sovereign immunity, limits the scope of the waiver to "action[s] • • • seeking relief other than money damages." Sec-

[11] Plaintiffs may—and sometimes do—waive all recovery in excess of $10,000 in order to preserve the "Little Tucker Act" jurisdiction of the district court. See, *e.g.*, *Heisig* v. *United States*, 719 F.2d 1153, 1156 n.8 (Fed. Cir. 1983); *Hohri* v. *United States*, 586 F. Supp. 769, 781 n.19 (D.D.C. 1984), aff'd in part and rev'd in part, 782 F.2d 227 (D.C. Cir. 1986), vacated, No. 86-510 (June 1, 1987). In such cases, although the action is not tried in the Claims Court, appeal nevertheless lies exclusively in the Federal Circuit. See 28 U.S.C. 1295(a)(2); *United States* v. *Fausto*, No. 86-595 (Jan. 25, 1988), slip op. 11; *United States* v. *Hohri*, slip op. 7-8. Although the matter is not entirely free from doubt, we believe that plaintiffs also may waive *all* monetary recovery—permanently forgoing any Tucker Act claim arising out of prejudgment events—and thereby litigate their cases for nonmonetary relief in the district court and regional court of appeals. Compare, *e.g.*, *Blassingame* v. *Secretary of Navy*, 811 F.2d 65, 69 (2d Cir. 1987) (allowing judicial review of decision of Board for Correction of Naval Records in district court and regional court of appeals because "Blassingame has expressly relinquished any claim for monetary relief"), with *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983) (noting general availability of judicial review of such decisions in the Claims Court). Respondent, however, has never indicated a desire to forgo any or all of its claim for past-due money as a means of preserving the jurisdiction of the district court and/or the regional court of appeals.

ond, Section 702 also provides that "[n]othing herein • • • confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." Third, 5 U.S.C. 704 limits "nonstatutory" APA review to cases of "final agency action for which there is no other adequate remedy in a court."[12] Each of these three conditions, as a limitation on the waiver of sovereign immunity, must be stricly construed.[13] As we explain in Parts II and III below, it is principally these explicit limitations in the APA that deprive the district court of jurisdiction over any portion of this lawsuit.

The Tucker Act – which in our view is the applicable waiver of sovereign immunity in this case – has its own peculiar limitations. Some of those limitations, as applicable to this case, were sketched out by this Court in *United States* v. *Mitchell*, 463 U.S. at 216-217 (footnotes and citations omitted):

> [T]he Tucker Act " 'does not create any substantive right enforceable against the United States for money damages.' " A substantive right must be found in some other source of law, such as "the Constitution, or any Act of Congress, or any regulation of an executive department." 28 U.S.C. § 1491. Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act. The claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon " 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' "

Each of these requirements for Tucker Act jurisdiction is met in the present case.

The substantive right that respondent seeks to enforce against the United States is based on the Medicaid statute. If respondent has correctly interpreted that statute to cover the special educational services at issue in this case, then the Secretary's obligation to reimburse a portion of the costs of those services is clear and undisputed: according to 42 U.S.C. 1396b(a), "the Secretary • • • shall pay" the appropriate sums to respondent. Thus, the source of substantive law on which respondent relies can fairly be interpreted (if respondent is right on the merits) as mandating compensation by the federal government for the "damage" sustained (*i.e.*, payment of the amount of reimbursement incorrectly withheld).[14]

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[12] Section 704 provides: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." This section sets forth two possible causes of action: statutory review ("[a]gency action made reviewable by statute") and nonstatutory or APA review ("final agency action for which there is no other adequate remedy in a court"). See generally, *e.g.*, H.R. Rep. 94-1656, *supra*, at 13-14 (discussing nonstatutory review); S. Rep. 94-996, *supra*, at 12-13 (same); Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 Harv. L. Rev. 1479, 1480-1481 & n.3 (1962). The present case, as we have noted, falls within the latter category.

[13] See, *e.g.*, *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941) ("The section must be interpreted in light of its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted."); see also *Library of Congress* v. *Shaw*, No. 85-54 (July 1, 1986), slip op. 7 ("we must construe waivers strictly in favor of the sovereign"); *United States* v. *Mottaz*, *supra*; P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 1351 (2d ed. 1973).

[14] The Federal Circuit has in fact reviewed under the Tucker Act cases brought to compel payment of sums allegedly due under federal grant-in-aid programs. See, *e.g.*, *Chula Vista City Sch. Dist.* v. *Bennett*, 824 F.2d 1573 (1987), cert. denied, No. 87-909 (Jan. 25, 1988); see also *Chula Vista City Sch. Dist.* v. *Bennett*, 474 U.S. 1098 (1986) (order) (vacating Ninth Circuit's judgment in same case because that court lacked jurisdiction over appeal in Tucker Act action). The court has not always identified, among the several different heads of Tucker Act jurisdiction (see generally *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002 (Ct. Cl. 1967)), the precise basis on which jurisdiction has rested. In our view, when (as in this case) a grantee participating in a federal grant-in-aid program sues, invoking a statute that requires the federal government to pay the grantee money on certain conditions and arguing that those conditions have been met, the action fits comfortably within the branch of Tucker Act jurisdiction based on a statute that can fairly be interpreted as mandating compensation. See *Mitchell*, 463 U.S. at 217. But see *Maryland Dep't of Human Resources* v. *Department of Health and Human Services*, 763

Nor can it be doubted that respondent seeks "money damages" as this Court used that term in *Mitchell*.[15] Whatever "money damages" may mean for purposes of the APA—a disputed question that we discuss in Part II.A below—it is clear beyond dispute that in the Tucker Act context "money damages" means any judgment for the payment of money. We know of only one court that has construed the term "money damages" under the APA to mean something other than a judgment for the payment of money; but even that court conceded, *for purposes of the Tucker Act*, that "historic practice • • • seems to have drawn a line between monetary relief (whether awarded as damages or not) and nonmonetary relief, rather than following" what the court viewed as "the more traditional common law distinction between money damages and specific relief (whether involving money or not)." *Maryland Dep't of Human Resources* v. *Department of Health & Human Services*, 763 F.2d 1441, 1447 (D.C. Cir. 1985) (*MDHR* v. *HHS*).

The term "money damages" is in fact not found in the Tucker Act at all; the statute refers only to "claim[s]" and nowhere uses the word "money" or any variant thereof. Rather, "money damages" is a shorthand phrase that this Court has often

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F.2d 1441, 1450-1451 (D.C. Cir. 1985) (action by grantee held not cognizable under Tucker Act despite existence of statutory obligation to pay); cf. *Sarasota* v. *EPA*, 799 F.2d 674 (11th Cir. 1986) (action by *prospective* grantee held not a Tucker Act action).

[15] To be sure, respondent has carefully framed its complaints to avoid terms normally used by one seeking a money judgment. Respondent apparently contends that this form of draftsmanship can suffice to *create* an APA-based cause of action that *would not* exist if the complaint were framed to seek money more directly. We refute that argument at pp. 21-23, *infra*, but for present purposes it suffices to observe that we doubt that anyone would seriously contend that drafting a complaint in "injunctive" terms suffices to *defeat* a Tucker Act-based cause of action that *would* exist if the complaint were framed to seek money more directly. Certainly, the courts whose jurisdiction is defined by the Tucker Act have regularly entertained actions in which the complaints were, like the ones in this case, framed to avoid the appearance of seeking a money judgment. See, *e.g.*, *Williams* v. *Secretary of the Navy*, 787 F.2d 552, 557-558 (Fed. Cir. 1986); *Maier* v. *Orr*, 754 F.2d 973, 982 (Fed. Cir. 1985); *Hoopa Valley Tribe* v. *United States*, 596 F.2d 435 (Ct. Cl. 1979).

used—interchangeably with other phrases describing monetary recoveries—to describe the limitations, inferred from legislative context, on the jurisdiction conferred by the Tucker Act.[16] For example, this Court has described the fundamental purpose of the Court of Claims as being the "payment of debts" (*Glidden Co.* v. *Zdanok*, 370 U.S. 530, 548 (1962) (opinion of Harlan, J.))—a form of monetary payments that would surely not be regarded as "damages" if a distinction were to be drawn between "damages" and other types of monetary remedies. Thus, "money damages" is, for Tucker Act purposes, synonymous

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[16] See, *e.g.*, *United States* v. *King*, 395 U.S. 1, 2-3 (1969) (jurisdiction of Court of Claims "limited to money claims against the United States Government"); *id.* at 3 (quoting *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575 (1867)) (" 'the only judgments which the Court of Claims [is] authorized to render against the government . . . are judgments for money found due from the government to the petitioner' "); *ibid.* (quoting *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 557 (1962) (opinion of Harlan, J.)) (" '[f]rom the beginning [the Court of Claims] has been given jurisdiction only to award damages . . . .' "); *ibid.* (suggesting that jurisdiction of Court of Claims extends to actions for "actual, presently due money damages from the United States"); *id.* at 4 ("cases seeking relief other than money damages from the Court of Claims have never been 'within its jurisdiction' "); *United States* v. *Testan*, 424 U.S. 392, 397-398 (1976) (repeating these passages from *King*); *United States* v. *Hohri*, slip op. 7 n.4 (describing all Tucker Act claims as "claims for money damages"); *Army & Air Force Exchange Service* v. *Sheehan*, 456 U.S. at 738-740 (describing backpay claim as a claim for money damages); *Richardson* v. *Morris*, 409 U.S. 464, 465 (1973) (per curiam) ("the Act has long been construed as authorizing only actions for money judgments"); *United States* v. *Jones*, 336 U.S. 641, 670 (1949) ("the Court of Claims has jurisdiction only to render a money judgment against the United States"); *United States* v. *Sherwood*, 312 U.S. 584, 588 (1941) ("it has been uniformly held, upon a review of the statutes creating the [Court of Claims] and defining its authority, that its jurisdiction is confined to the rendition of money judgments in suits brought for that relief against the United States"); *United States* v. *Jones*, 131 U.S. 1, 18 (1889) (under Tucker Act, "in the point of providing only for money decrees and money judgments, the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands"); see also *Fidelity Constr. Co.* v. *United States*, 700 F.2d 1379, 1384 (Fed. Cir.), cert. denied, 464 U.S. 826 (1983); *Eastport S.S. Corp.* v. *United States*, 372 F.2d at 1008; *Larionoff* v. *United States*, 533 F.2d 1167, 1181 (D.C. Cir. 1976), aff'd, 431 U.S. 864 (1977); Brenner, *Judicial Review by Money Judgment in the Court of Claims*, 21 Fed. B.J. 179, 179 & n.3 (1961).

with "money judgment"; the word "damages" has never been used as a limitation on the kinds of money judgments that the Claims Court may enter.

There is one further important limitation on the waiver of sovereign immunity effected by the Tucker Act. Courts exercising jurisdiction under that Act have since 1972 been given certain carefully limited equitable powers. See 28 U.S.C. 1491(a)(2) and (3). This marks a departure from the historical rule, which was that the Court of Claims had no equitable powers of any kind. See cases cited in note 16, *supra; Lee* v. *Thornton*, 420 U.S. 139 (1975) (per curiam). Since 1972, however, the court has had the power, among others, to "remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just" (28 U.S.C. 1491(a)(2)), so long as the "case" is first properly determined to be "within its jurisdiction" (*ibid.*; see *United States* v. *Testan*, 424 U.S. at 404 & n.7).

In sum, Congress has enacted two general waivers of sovereign immunity, each addressing an extremely broad range of subject matters but each also carefully crafted to restrict which actions may be brought and which remedies plaintiffs may seek and obtain. It is against those two carefully crafted statutory schemes, and their limitations, that respondent's attempt to invoke the jurisdiction of the district court must be measured.

II. The Administrative Procedure Act Does Not Waive the Sovereign Immunity of the United States for an Action in District Court Seeking the Payment of Money Allegedly Due to the Plaintiff Under a Federal Grant-in-Aid Program

Respondent contends, contrary to the holding of the court of appeals, that "section 702's waiver of sovereign immunity encompasses the Commonwealth's complaint for judicial review * * * in its entirety" (87-929 Cross-Pet. 8). In our view, however, Section 702 is inapplicable to respondent's request for an "injunction" to pay money because that statute waives sovereign immunity only for "[a]n action * * * seeking relief other than money damages." Furthermore, even if that obstacle were overcome, the request for an injunction to pay money would be beyond the scope of the APA because the Tucker Act provides respondent an "adequate remedy" to secure the monetary relief it seeks in the Claims Court, so that Section 704 forbids APA review.

A. An Action Seeking Allegedly Past-Due Money Under a Federal Grant-in-Aid Program Is an Action for "Money Damages," for Which the Administrative Procedure Act Does Not Waive Sovereign Immunity

Respondent has not yet explained why its demand that the district court "enjoin" petitioners from failing to pay past-due money is cognizable under the APA notwithstanding that statute's exclusion of "money damages" from the scope of its waiver of sovereign immunity. Nevertheless, two theories appear possible. One stems from respondent's contention that it "never sought" a money judgment, apparently on the theory that an injunction to pay money is not a money judgment (87-929 Cross-Pet. 12; see 87-712 Br. in Opp. 17). The other stems from the D.C. Circuit's decision in *MDHR* v. *HHS*, *supra*, holding that a grantee's action to recover money allegedly due from the federal government as reimbursement for past services is not an action for "money damages" within the meaning of the APA. Neither theory withstands scrutiny.

1. An Action Seeking to "Enjoin" a Federal Official to Pay Money or to "Declare" that the Federal Government Is Liable to the Plaintiff Is an Action for a Money Judgment

In this case, respondent filed two complaints in federal district court, each seeking "judicial review of a final decision of the [GAB], which sustained the * * * disallowance of [a specified sum] in federal financial participation due to the Commonwealth of Massachusetts" (Pet. App. 89a-90a, 95a-96a). Each complaint prayed that the court "[e]njoin the [defendants] from failing or refusing to reimburse the Commonwealth, or from recovering from the Commonwealth, the federal share of

expenditures for medical assistance to eligible residents of intermediate care facilities for the mentally retarded during the period in question" (*id.* at 93a, 98a). Respondent claims in these two complaints that it has a legal right to $11,323,958 in reimbursement for 1978-1982 Medicaid expenses and seeks to have the courts determine the merits of that claim of entitlement (see *id.* at 92a-93a, 98a-99a).

The court of appeals was correct in its determination that these requests should be treated no differently from a request, in terms, for a money judgment. *Every* complaint seeking the recovery of money could be framed as a request for an "injunction" against nonpayment of that money. If artful pleading sufficed to create an APA-based cause of action, then the exclusion of "money damages" in the statute would become nothing but a trap for the unwary plaintiff's lawyer who neglected to frame his monetary request in "injunctive" (or "declaratory") terms. Congress plainly intended no such capricious result when it amended the statute in 1976.

The courts of appeals have uniformly rebuffed efforts to evade the limitations imposed by Congress on the APA's waiver of sovereign immunity by the mere device of framing a complaint in "equitable" terms. They have consistently recognized that cases seeking monetary relief are actions cognizable, if at all, only under the Tucker Act. See, *e.g.*, *Chula Vista City Sch. Dist.* v. *Bennett*, 824 F.2d 1573, 1579 (Fed. Cir. 1987), cert. denied, No. 87-909 (Jan. 25, 1988); *Amoco Prod. Co.* v. *Hodel*, 815 F.2d 352, 361 (5th Cir. 1987), petition for cert. pending, No. 87-372; *Wronke* v. *Marsh*, 767 F.2d 354, 355 (7th Cir. 1985), cert. denied, No. 86-193 (Oct. 6, 1986); *Chula Vista City Sch. Dist.* v. *Bell*, 762 F.2d 762, 764-765 (9th Cir. 1985), vacated on other grounds, 474 U.S. 1098 (1986); *Van Drasek* v. *Lehman*, 762 F.2d 1065, 1071 n.11 (D.C. Cir. 1985); *United States* v. *City of Kansas City*, 761 F.2d 605, 608-609 (10th Cir. 1985); *Hahn* v. *United States*, 757 F.2d 581, 589 (3d Cir. 1985); *Maier* v. *Orr*, 754 F.2d 973, 982 (Fed. Cir. 1985); *Tennessee ex rel. Leech* v. *Dole*, 749 F.2d 331, 336 (6th Cir. 1984), cert. denied, 472 U.S. 1018 (1985); *Minnesota ex rel. Noot* v.

Heckler, 718 F.2d 852, 859 n.12 (8th Cir. 1983); *B.K. Instrument, Inc.* v. *United States*, 715 F.2d 713, 727 (2d Cir. 1983); *Portsmouth Redevel. & Hous. Auth.* v. *Pierce*, 706 F.2d 471, 474 (4th Cir.), cert. denied, 464 U.S. 960 (1983); *Bakersfield City Sch. Dist.* v. *Boyer*, 610 F.2d 621, 628 (9th Cir. 1979); *Hoopa Valley Tribe* v. *United States*, 596 F.2d 435, 436 (Ct. Cl. 1979); *Carter* v. *Seamans*, 411 F.2d 767, 771 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970).

These decisions are in accord with this Court's disposition of a closely analogous question in *Edelman* v. *Jordan*, 415 U.S. 651 (1974). The court of appeals in that case sought to justify an award of money from a state treasury, in the face of the State's Eleventh Amendment immunity from such awards, by phrasing its order to pay money in "equitable" terms. This Court, however, rejected the proposition that "any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled 'equitable' in nature" (*id.* at 666). The Court wrote: "While the Court of Appeals described this retroactive award of monetary relief as a form of 'equitable restitution,' it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." *Id.* at 668. So too here, there is simply no practical difference between an "injunction" ordering petitioners to pay federal money to respondents and a money judgment against the United States. If the monetary relief demanded in respondent's complaints may be sought in district court under the APA, it must be because those complaints *in substance* do not seek "money damages" as Congress used that term, not because of the way in which the complaints have been drafted.

2. An Action for a Money Judgment Is an Action for "Money Damages" Within the Meaning of the Administrative Procedure Act

a. In *MDHR* v. *HHS*, *supra*, as we have observed, the D.C. Circuit recognized the "historic practice" under the Tucker Act of drawing a line between "monetary relief (whether awarded as damages or not) and nonmonetary relief" (763 F.2d at 1447). The former category of relief—which this Court has regularly referred to as "money damages" (see note 16, *supra*)—may be granted under the Tucker Act in appropriate cases. The latter category of relief may not be granted under the Tucker Act (except in certain instances in which it is incidental to monetary relief and is supported by specific statutory authority added to the Act since 1972). In our view (which was shared by the court of appeals), the term "money damages" in the APA was meant to draw the same distinction: monetary relief simply does not come within Section 702's waiver of sovereign immunity, but nonmonetary relief generally does (subject, of course, to the statute's other limitations). Accordingly, we submit that respondent's claims for "money damages" fall outside the APA's terms.

The D.C. Circuit took a contrary view in *MDHR* v. *HHS*. The court dismissed the commonsense distinction between monetary and nonmonetary relief as an "obscure feature of Tucker Act jurisdiction" that Congress was unlikely to have had "in mind" when it drafted Section 702 (763 F.2d at 1447). Instead, the court suggested that the phrase "money damages" should be read in reference to an esoteric distinction, which the court identified as coming from the common law, between "money damages" and court-ordered payments of money that constitute not damages but "specific remedies." *Id.* at 1446 (citing D. Dobbs, *Handbook on the Law of Remedies* 135 (1973)).[17] Under this distinction, the court reasoned, actions

[17] Although the D.C. Circuit stated that the distinction is an established and traditional feature of the common law, it is far from clear to us that the common law did in fact draw any such sharp distinction between "money damages" and a " 'money award [that] is also a specie remedy' " (763 F.2d at 1446 (quoting D. Dobbs, *supra*, at 135)). For example, in its chapter on specific performance, a leading treatise on the American common law of contracts refers to monetary remedies generally as something to be *contrasted* with specific relief. See 5A A. Corbin, *Corbin on Contracts* § 1139, at 111 (1964) ("the more common remedy [than specific performance] for breach of a contract is a judgment for compensation in money"); *id.* § 1142, at 119 (footnote omitted) ("In the case of money debts or other unilateral contracts for the mere payment of money, there is generally no difficulty in determining the amount of damages. • • • [A] suit for specific performance, in so far as that involves any difference from the money judgment, is not maintainable.").

seeking allegedly past-due reimbursement under federal grant-in-aid programs seek a form of "specific relief" and thus do not run afoul of the APA's exclusion of actions seeking "money damages."[18]

[18] The D.C. Circuit's analysis, however, is complex and would require an additional inquiry before it could be finally determined whether the monetary part of this action was properly brought in district court. *After* determining that the action before it was not removed from the district court's jurisdiction by the APA's exclusion of "money damages," the D.C. Circuit held that it must also inquire whether the action was also cognizable under the Tucker Act and, if so, whether the Tucker Act "impliedly forbids" relief under the APA (763 F.2d at 1448-1449). The court then held that Title XX of the Social Security Act, 42 U.S.C. (& Supp. III) 1397 *et seq.*, cannot fairly be interpreted as mandating compensation by the federal government, so that there was no available Tucker Act remedy (763 F.2d at 1450-1451). Thus, the court concluded that an APA action was available.

We think the D.C. Circuit's analysis of Title XX was wrong—the statute contains an express payment-mandating provision (42 U.S.C. (& Supp. III) 1397a)—but in any event the court's reasoning exposes a serious flaw in its whole framework of analysis. The point of the *Eastport Steamship* test (requiring a money-mandating statute as a condition precedent to Tucker Act jurisdiction) is to distinguish those cases in which the federal government has opened up the federal treasury from those cases in which no source of positive law reflects a governmental intention to compensate those who complain of violations of law. See generally, *e.g.*, *United States* v. *Testan*, *supra*. Under the D.C. Circuit's analytic framework, however, this scheme is turned upside down. Plaintiffs can obtain money from the federal treasury whether or not they can identify a money-mandating statute; the only difference between those who can and those who cannot identify such a statute is that the former are required to proceed in the Claims Court under the Tucker Act whereas the latter are permitted to proceed under the APA and take advantage of its generally more liberal remedial provisions in addition to obtaining money.

Like the First Circuit, we think "[t]he legislative history can, and * * * should, be read otherwise." *Departmental Grant Appeals Bd.*, 815 F.2d at 782; see also *New Mexico* v. *Regan*, 745 F.2d 1318, 1321 n.3 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); *Minnesota ex rel. Noot* v. *Heckler*, 718 F.2d 852, 858-859 (8th Cir. 1983). With all due respect, it is the D.C. Circuit's position, not ours, that implausibly inserts an "obscure feature" of remedial law into Congress's collective "mind" in 1976. Even if the common law of remedies can be said to reflect a distinction between "money damages" and monetary "specific relief," the legislative history contains not a shred of evidence that Congress had such common law categories in mind when it enacted the waiver of sovereign immunity in the APA.[19] On the other hand, there *is* ample indication that Congress had the Tucker Act very much "in mind" when it used the words "money damages," and that in this context, as under the Tucker Act, the phrase is synonymous with "monetary relief."

b. The waiver of sovereign immunity that Congress added to the APA in 1976 was the direct result of years of advocacy by

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[19] There is an additional oddity in the D.C. Circuit's view that a waiver of the sovereign immunity of the United States should be construed by reference to distinctions allegedly drawn in the common law. Suits against the United States are, invariably, not "suits at common law." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962) (opinion of Harlan, J.). It is therefore unclear why the common law of remedies should be thought a particularly useful guide to construction of the statutes that allow such suits. Rather, the pre-1976 conception of sovereign immunity would seem to be the most appropriate source of guidance on just what protections Congress was – and was not – waiving in the 1976 amendments to the APA. In the larger context of sovereign immunity that formed the backdrop for the 1976 amendments to the APA, this Court had not generally drawn the distinction, espoused by the D.C. Circuit in *MDHR* v. *HHS*, between "money damages" and monetary "specific relief." Rather, this Court had distinguished between monetary and nonmonetary relief. See, *e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. at 704 ("[I]t is one thing [for Congress] to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act."); but cf. *id.* at 688 (contrasting "damages" and "specific relief" and including in the latter category "the recovery of specific property or monies").

leading administrative law scholars. See, *e.g.*, Byse, *supra*, 75 Harv. L. Rev. at 1523-1531; Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 389 (1970); Davis, *Sovereign Immunity Must Go*, 22 Admin. L. Rev. 383 (1970).[20] Statutes waiving sovereign immunity, similar to the one eventually enacted, were proposed by these scholars and by the Administrative Conference of the United States (see 5 U.S.C. 571-576) in the 1960s and early 1970s. See generally 121 Cong. Rec. 3987 (1975) (remarks of Sen. Kennedy).

The version of Section 702 proposed by the Administrative Conference in 1969 was, in all respects pertinent to this case, worded identically to the section that now appears in the United [1] States Code. Compare *Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judicary*, 91st Cong., 2d Sess. 90 (1970) [hereinafter *1970 Hearing*] (reprinting Administrative Conference proposal) with 5 U.S.C. (Supp. IV) 702.[21] In particular, it limited the waiver of sovereign immunity to actions "seeking relief other than money damages." Hearings on the proposals to waive sovereign immunity were held both in 1970 and in 1976. See *1970 Hearing; Administrative Procedure Act Amendments of 1976: Hearings on S. 796, S. 797, S. 798, S. 799, S. 800, S. 1210, S. 1289, S. 2407, S. 2408, S. 2715, S. 2792, C. 3123, S. 3296, and S. 3297 Before the Subcomm. on Admin. Practice*

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[20] See generally *Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970). In this hearing, the article by Professor Davis that we have cited in the text above is reprinted in full (*id.* at 201-223), as are three memoranda by Professor Cramton on behalf of the Committee on Judicial Review of the Administrative Conference of the United States (*id.* at 77-91, 92-156, 157-200). Professor Byse's leading role in the process that gave rise to the proposed statute is acknowledged often in these materials (see, *e.g.*, *id.* at 116, 237).

[21] The proviso that now appears in Section 702, pertaining to the specification of officers responsible for compliance with decrees, did not appear in the Administrative Conference proposal but was added later at the suggestion of Assistant Attorney General Scalia. See S. Rep. 94-996, *supra*, at 1-2, 26-27.

and Procedure of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. (1976) [hereinafter *1976 Hearings*]. All of these materials – the law review articles and the 1970 hearing as well as the materials generated by the 94th Congress – shed light on Congress's purpose in excluding "money damages" from the APA's waiver of sovereign immunity, and all of them decisively refute the D.C. Circuit's interpretation of the congressional action.

Preservation of the Tucker Act – and its review-limiting features – was a persistent theme of the law reformers. For example, Professor Byse wrote that any new statute waiving immunity "should be so phrased as not to effect an implied repeal or amendment of any prohibition, limitation, or restriction of review contained in existing statutes, such as the Tucker Act and the Federal Tort Claims Act, in which Congress has conditionally consented to suit" (75 Harv. L. Rev. at 1525 (footnote omitted)).[22] Professor Davis wrote that the purpose of what is now 5 U.S.C. (Supp. IV) 702(2) was "to avoid making any change in the interpretation of other statutes granting consent to suits against the government, including the Court of Claims Act, the Tucker Act, and the Federal Tort Claims Act" (22 Admin. L. Rev. at 404; *1970 Hearing* 222). He added (*ibid.*): "If any statute such as these is interpreted to forbid a suit for specific performance, then that interpretation remains unchanged by the present proposal. The intent of Congress as expressed or implied in other statutes remains undisturbed." Professor Cramton made similar observations (68 Mich. L. Rev. at 435).[23]

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[22] In discussing his own proposal, Professor Byse wrote: "Since the proposal would permit the court to dismiss or deny relief where the plaintiff sought expenditure of federal funds, the various limitations contained in the Tucker and Tort Claims statutes would not be affected" (75 Harv. L. Rev. at 1529).

[23] The Tucker Act also was seen as a statute that might provide an adequate remedy and therefore (see 5 U.S.C. 704) preclude an APA-based action. For example, Professor Byse explained that the abolition of sovereign immunity would negate the actual ground of decision in *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, but that the same result might have been reached "on the ground • • • that the plaintiff had an adequate legal remedy for money damages under the Tucker Act" (75 Harv. L. Rev. at 1530 n.157; see also Cramton, *supra*, 68 Mich. L. Rev. at 405).

Likewise, the law reformers – without distinguishing "damages" actions from other kinds of actions for money – disclaimed any intention to waive sovereign immunity for actions seeking payments from the federal treasury. Professor Byse's proposed statute, for example, would have preserved as a ground for dismissal the objection "that the relief requested • • • would compel the disbursement of funds belonging to the United States" (75 Harv. L. Rev. at 1528). Professor Davis described one of the "two main purposes" of the Administrative Conference's proposed statute as being "to allow the plaintiff in any suit for relief *other than money* to name the United States as defendant" (22 Admin. L. Rev. at 403; *1970 Hearing* 221 (emphasis added)), and he described that draft statute's "other than money damages" provision as a "[l]imitation of [the] proposal to relief other than money" (*id.* at 404; *1970 Hearing* 222 (emphasis omitted)). "The proposed amendment will mean only that when a party who is hurt by governmental action seeks relief *other than money*, sovereign immunity will not be a bar to judicial determination of • • • legal questions" (*id.* at 405; *1970 Hearing* 223 (emphasis added)). Professor Cramton wrote of the Administrative Conference proposal that its "explicit exclusion of *monetary relief* makes it clear that sovereign immunity is abolished only in actions for specific relief" (68 Mich. L. Rev. at 429 (emphasis added; footnote omitted)).

The 1970 hearing built on, and is entirely consistent with, the views expressed in these law review articles. Professor Cramton, on behalf of the Administrative Conference, presented a lengthy statement and testified in the 1970 hearing (see *1970 Hearing* 16-55). The Administrative Conference proposal was further explained in a memorandum by Professor Cramton, which stated as follows (*1970 Hearing* 118 (emphasis added)):

> Although the recommendation does not use the term "specific relief," the principal effect of the amendment will be to cut off the defense of sovereign immunity in suits for specific relief. Perhaps ninety per cent of the cases affected will be suits for injunction or declaratory judgment or for

> both, and perhaps most of the rest will be suits for relief in the nature of mandamus. But all other specific relief is covered, including specific performance, quieting title, ejectment and habeas corpus. *All forms of monetary relief, however, are excluded from the recommendation.*

See also *id.* at 139 ("the language of our proposal, which is applicable in terms only to actions 'seeking relief other than money damages,' indicates that sovereign immunity remains as a defense to actions seeking monetary relief"); *id.* at 31, 140.

Another key witness at the 1970 hearing was Dan M. Byrd, Jr., representing the Administrative Law Section of the American Bar Association, which had worked together with the Administrative Conference to develop the legislative proposal. Mr. Byrd stated that the amendment sought to permit "all [specific relief] remedies except those 'concerning monetary relief and specific relief in lieu thereof' " (*1970 Hearing* 58). Mr. Byrd then expanded on his reference to "monetary relief and specific relief in lieu thereof" (*ibid.* (emphasis added in part)):

> *The meaning of the exception about monetary relief.* All suits seek either monetary or non-monetary relief. Because the present law concerning sovereign immunity in suits for monetary relief is reasonably satisfactory on account of such legislation as the Court of Claims Act, Tucker Act, and Federal Tort Claims Act, the proposed amendment does not affect suits for monetary relief. It applies only to suits for non-monetary relief. The exception of "existing law concerning monetary relief and specific relief in lieu thereof" is designed to make clear that not only suits for money *but also substitutes for suits for money are unaffected by the proposed amendment. Examples of specific relief in lieu of monetary relief include a suit for specific performance of an agreement to pay money, a suit for a declaratory judgment that the United States is legally obligated to pay money to the plaintiff, and a suit for an injunction against action which interferes with payment.*

These two passages demonstrate that – contrary to the D.C. Circuit's analysis – the term "money damages" was intended to include *all* forms of monetary relief. Mr. Byrd's remarks in particular refute any contention that either the form or the substance of a plaintiff's requests for money should suffice to escape from the APA's requirement that district court actions seek "relief other than money damages."

The legislative history emanating from the Congress that actually enacted the waiver of sovereign immunity, although perhaps less illuminating than the materials we have already quoted, is again entirely consistent with those materials. The committee reports on the 1976 amendments stated as follows (H.R. Rep. 94-1656, *supra*, at 11 (emphasis added); S. Rep. 94-996, *supra*, at 10 (emphasis added)):

> The first of the additional sentences [in section 702] provides that claims challenging official action or nonaction, and seeking relief other than money damages, should not be barred by sovereign immunity. *The explicit exclusion of monetary relief makes it clear that sovereign immunity is abolished only in actions for specific relief (injunction, declaratory judgment, mandatory relief, etc.).* Thus, limitations on the recovery of money damages contained in the Federal Tort Claims Act, the Tucker Act, or similar statutes are unaffected.

This passage uses the terms "money damages" and "monetary relief" interchangeably and opposes money in general to "specific relief." It also disavows any intent to affect Tucker Act jurisdiction.

Another passage in the committee reports identifies "monetary liability" and "money damages" and opposes them to other forms of relief; it also makes express Congress's intent that the courts interpret Section 702 in light of the Tucker Act (H.R. Rep. 94-1656, *supra*, at 4-5 (emphasis added); S. Rep. 94-996, *supra*, at 3-4 (emphasis added)):

> Congress has made great strides toward establishing monetary liability on the part of the Government for wrongs committed against its citizens by passing the Tucker Act of 1875, 28 U.S.C. sections 1346, 1491, and the Federal Tort Claims Act * * *. S. 800 [*i.e.* the amendments

> to 28 U.S.C. 1331 and 5 U.S.C. 702] would strengthen this accountability by withdrawing the defense of sovereign immunity in actions seeking *relief other than money damages, such as an injunction, declaratory judgment, or writ of mandamus*. Since S. 800 would be limited only to actions of this type for specific relief, the recovery of money damages contained in the Federal Tort Claims Act and the Tucker Act governing contract actions would be unaffected.

The reports contain other similar references. See generally H.R. Rep. 94-1656, *supra*, at 1-11; S. Rep. 94-996, *supra*, at 1-12. Thus, the committee reports demonstrate that the Tucker Act, "obscure feature[s]" (*MDHR* v. *HHS*, 763 F.2d at 1447) and all, was very much "in mind" (*ibid.*) when Congress limited the APA waiver of sovereign immunity by excluding actions for "money damages."[24]

c. Against all of this legislative history stands the D.C. Circuit's assertion that a reference in the 1976 House report to litigation involving federal grant-in-aid programs makes it "virtually conclusive" that Congress intended to permit such ligitation to be brought under the APA. *MDHR* v. *HHS*, 763 F.2d at 1447-1448; see H.R. Rep. 94-1656, *supra*, at 9; see also S. Rep. 94-996, *supra*, at 8. In the D.C. Circuit's view, litigation involving federal grant-in-aid programs would ordinarily seek specific monetary relief, and therefore the APA's exclusion of "money damages" should not be read to preclude an award of money by district courts in cases like this one.

[24] Shortly after the 1976 amendments to the APA were passed, one commentator observed that "the non-applicability to suits seeking money damages clearly refers principally to suits under the Tucker and Tort Claims Acts" (Jacoby, *supra*, 29 Admin. L. Rev. at 271). Professor Jacoby also made observations about the interplay between the new statute and some of this Court's Tucker Act decisions. In his view, this Court's interpretation of the Tucker Act in *United States* v. *Testan*, *supra*, would "be unaffected because • • • it was an action seeking monetary relief with respect to which the new amendment of 5 U.S.C. § 702 was expressly made inapplicable." As to this Court's interpretation of the Tucker Act in *United States* v. *King*, *supra*, Professor Jacoby thought that the statute "would again have no effect since the last clause of the amendment of 5 U.S.C. § 702 specifically prohibits granting relief if any other consent statute 'expressly or impliedly forbids the relief which is sought.' It would seem that the Tucker Act is a statute which 'impliedly' forbids declaratory relief." 29 Admin. L. Rev. at 283-284 (footnote omitted).

A closer examination of this reference in the 1976 legislative history, however, casts doubt on the D.C. Circuit's assumption that Congress equated grant-in-aid litigation with attempts to secure monetary relief. The references to federal grant-in-aid programs in the 1976 committee reports specifically note that they are taken from the 1970 hearing. See H.R. Rep. 94-1656, *supra*, at 9 & n.27; S. Rep. 94-996, *supra*, at 8 & n.27. Review of the 1970 hearing shows that the entire passage in the 1976 committee reports, including the reference to federal grant-in-aid programs, was taken virtually verbatim from a statement prepared by Professor Cramton for the 1970 hearing, which simply lists "administration of federal grant-in-aid programs" as one source of controversies giving rise to sovereign immunity problems. See *1970 Hearing* 23.[25] Professor Cramton elaborated somewhat on the basis for his reference to federal grant-in-aid programs in a memorandum on sovereign immunity submitted on behalf of the Administrative Conference. See *1970 Heaing* 121. Professor Cramton cited two cases as examples of the sovereign immunity defenses that had arisen in federal grant-in-aid cases: *Lee County Sch. Dist. No. 1* v. *Gardner*, 263 F. Supp. 26 (D.S.C. 1967), and *Dermott Special Sch. Dist.* v. *Gardner*, 278 F. Supp. 687 (E.D. Ark. 1968).[26] Exam-

[25] Professor Cramton's statement read as follows (*1970 Hearing* 23):

> Cases in which the doctrine [of sovereign immunity] has been invoked have included challenges to agricultural regulations, governmental employment, tax investigations, postal-rate matters, administration of labor legislation, control of subversive activities, food and drug regulation, administration of federal grant-in-aid programs, and many others.

See also Cramton, *supra*, 68 Mich. L. Rev. at 422-423.

[26] Professor Cramton also cited *Congress of Racial Equality* v. *Social Security Administration*, 270 F. Supp. 537 (D. Md. 1967), but that case involved guidelines for equal opportunity in federal employment, not a grant-in-aid program.

ination of the cases, however, reveals that in neither case did the plaintiff seek to require the government to pay or to cease withholding federal funds. Instead, both cases involved challenges to federal inaction or regulatory guidelines, and success in those challenges would not have resulted in the payment of federal funds. *Lee County*, for example, involved a challenge to the federal agency's decision to defer action on applications for federal funds under certain education programs. The relief sought was to force the agency to act on the applications: whether the applications would be granted or denied would be the product of an independent agency decision.[27] Similarly, *Dermott* involved a challenge to guidelines establishing requirements for federally funded programs. The few references to federal grant-in-aid programs in the legislative history, therefore, hardly support a conclusion—contrary to the rest of the legislative history—that Congress intended to allow the APA to be used for the recovery of money.

In sum, the legislative history of the APA strongly supports the view that the words "money damages" should be read to mean any monetary relief, whether it is in the nature of damages or in the nature of "specific relief." The D.C. Circuit's contrary reading of the legislative history is incorrect and cannot properly be used to support respondents' effort to litigate this case in federal district court rather than the Claims Court.

B. Even if an Action Seeking Money Under a Federal Grant-in-Aid Program Is Not an Action for "Money Damages," the Administrative Procedure Act Is Inapplicable Because the Tucker Act Provides an "Adequate Remedy in a Court"

Even if one were to accept the D.C. Circuit's view that an action to recover federal grant funds is not an action for "money damages" within the meaning of the APA, it would not follow that such an action may be pursued in district court. The D.C.

[27] There is language in *Lee County* (see, *e.g.*, 263 F. Supp. at 30) indicating that the government had argued that "the complaint seeks an order directing them to pay over property of the government, in the form of funds." The court, however, clearly viewed the school district as instead actually challenging "the legality of the deferrals" (*id.* at 33).

Circuit itself recognized this (see note 18, *supra*). That court suggested that the existence of a Tucker Act remedy in the Claims Court for the complained-of withholding of funds might "impliedly forbid" the grant of relief under the APA. That may be correct, but in our view the D.C. Circuit overlooked a simpler reason why the availability of monetary redress under the Tucker Act necessarily precludes the maintenance of an action for the recovery of money in district court. The APA does not support an action seeking nonstatutory review of administrative action unless there is "no other adequate remedy in a court" (5 U.S.C. 704). As we have seen, relief under the Tucker Act is precisely the kind of remedy that Congress thought might be "adequate" and therefore might preclude nonstatutory review under the APA (see note 23, *supra*).[28]

Whatever might be said about the adequacy of a Tucker Act remedy vis-à-vis nonmonetary claims, a Tucker Act remedy for monetary claims, when it exists, provides exactly the *same* redress—payment of money—that a plaintiff seeks in an action under the APA to enjoin the government to pay. In this case, as observed at pp. 16-20, *supra*, a Tucker Act remedy for petitioners' alleged misconstruction of the Medicaid statute exists. Thus, respondent clearly has an "other adequate remedy in a court." Accordingly, Section 704 independently precludes respondent from maintaining the monetary part of this action in district court, and the judgment of the court of appeals should in this respect be affirmed.

[28] For this reason, as explained more fully at pp. 43-44, *infra*, the availability of a Tucker Act remedy in the Claims Court should be held to preclude the exercise of jurisdiction by the district court over the "prospective" portion of this case as well as the exercise of jurisdiction over the monetary part of the case. The discussion in the text above, however, is confined to the proposition that Section 704 is an independent basis to uphold the ruling of the court of appeals that the monetary portion of this case belongs in the Claims Court.

III. A District Court May Not Assert Jurisdiction Over an Action Seeking "Prospective" Declaratory or Injunctive Relief Based on the Same Legal Theories That Underlie the Plaintiff's Tucker Act Claim for Past-Due Money

The Claims Court has exclusive jurisdiction over Tucker Act claims for monetary relief in excess of $10,000. As we have demonstrated and as the court of appeals held, the Claims Court therefore had exclusive jurisdiction over at least part of this case. The court of appeals, however, held that the exclusive jurisdiction of the Claims Court extends *only* to the claim for monetary relief. According to the court of appeals, a "mixed" case involving both a claim for past-due money and a claim for prospective relief can be bifurcated, with the district court and the regional court of appeals deciding the claim for prospective relief, and the Claims Court and the Federal Circuit deciding the claim for money damages.

In contrast, other courts have concluded that the Claims Court has exclusive jurisdiction over any case that *includes* a Tucker Act claim.[29] Under this interpretation, claim

[29] In contexts similar to this one, see *Amoco Prod. Co.* v. *Hodel*, 815 F.2d 352, 359-360 (5th Cir. 1987), petition for cert. pending, No. 87-372; *New Mexico* v. *Regan*, 745 F.2d 1318 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); *Portsmouth Redevel. & Hous. Auth.* v. *Pierce*, 706 F.2d 471 (4th Cir.), cert. denied, 464 U.S. 960 (1983). In the context of actions by military or civilian employees seeking reinstatement and backpay, see *Matthews* v. *United States*, 810 F.2d 109, 112 (6th Cir. 1987); *Keller* v. *MSPB*, 679 F.2d 220, 223 (11th Cir. 1982); *Denton* v. *Schlesinger*, 605 F.2d 484 (9th Cir. 1979); *Cook* v. *Arentzen*, 582 F.2d 870, 878 (4th Cir. 1978); *Carter* v. *Seamans*, 411 F.2d 767 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970).

There is also contrary authority in each context. In contexts similar to this one, see *Minnesota ex rel. Noot* v. *Heckler*, 718 F.2d 852 (8th Cir. 1983); *Rowe* v. *United States*, 633 F.2d 799 (9th Cir. 1980), cert. denied, 451 U.S. 970 (1981). In the reinstatement-and-backpay context, see *Chabal* v. *Reagan*, 822 F.2d 349, 354 (3d Cir. 1987) (and other Third Circuit cases cited therein); *Shaw* v. *Gwatney*, 795 F.2d 1351, 1356-1357 (8th Cir. 1986) (and other Eighth Circuit cases); and *Smith* v. *United States*, 654 F.2d 50, 52 (Ct. Cl. 1981). Although the Court of Claims endorsed claim splitting in the *Smith* case, its successor court more recently observed in a similar reinstatement-and-backpay case that "[n]either the law nor practical purpose" justified "bifurcating [the plaintiff's] money and equitable claims between the Claims Court and the

splitting is prohibited.[30] If the plaintiff asserts only non-Tucker Act claims, or expressly waives any accrued Tucker Act claim, then the district court has jurisdiction. But if the complaint, fairly construed, includes a Tucker Act claim for monetary relief against the United States, and there is no other applicable waiver of sovereign immunity that would permit the action to proceed in district court, then the Claims Court has exclusive jurisdiction over the entire action. We submit that the latter view is the correct one.[31]

Congress could not have intended to allow plaintiffs to preempt the Claims Court from deciding the legal merits underlying Tucker Act claims by merely filing an initial action

district court, respectively." *Oliveira* v. *United States*, 827 F.2d 735, 737 (Fed. Cir. 1987). Thus, although the Third and Eighth Circuits appear to have come down firmly in favor of claim splitting, the position of the Federal Circuit is less clear.

[30] Our discussion in the text is, of course, confined to cases in which the claims for prospective relief depend on the same legal theories that underlie the Tucker Act claim for money. Claim splitting is sometimes unavoidable when a Tucker Act plaintiff raises additional issues on the merits that form no part of his Tucker Act case. For example, a plaintiff who seeks relief under both the Tucker Act and the Federal Tort Claims Act must (unless his Tucker Act claim is for $10,000 or less) litigate in both the Claims Court and the district court. Cf. *United States* v. *Hohri*, *supra*.

[31] As should be clear from the text, we do not agree with either the "primary purpose" test that some courts have applied or the "significant prospective effect" test applied below (see Pet. 12-13 & n.7, 15 n.9; Pet. App. 6a n.1). The "primary purpose" test requires the same kind of "psychological inquiry" that was condemned—we think rightly—in *Ramirez de Arellano* v. *Weinberger*, 724 F.2d 143, 154 n.15 (1983) (Scalia, J.), rev'd en banc, 745 F.2d 1500 (D.C. Cir. 1984), vacated, 471 U.S. 1113 (1985). The "significant prospective effect" test would, as Judge Coffin observed (*Departmental Grant Appeals Bd.*, 815 F.2d at 789 (concurring opinion)), permit claim splitting in all but the very rare case, thus interfering to the maximum possible extent with the Claims Court's congressionally assigned role of determining the merits of disputed issues in money cases. In place of these two rules that have been employed by the courts of appeals, we submit that there should be a simple rule that forbids claim splitting when, as in this case, all of the legal issues that the district court would resolve (if claim splitting were allowed) are legal issues that the Claims Court would necessarily resolve in adjudicating the money claim.

in a district court on the basis of some "prospective" effect of the governmental decision at issue. There is neither a textual nor a historical basis for allowing claim splitting, and in the absence of any such affirmative endorsement by Congress it should be prohibited. Moreover, the APA – far from affirmatively endorsing claim splitting – prohibits it by limiting its waiver of sovereign immunity to those situations in which there is no other adequate remedy in a court and no other statute expressly or impliedly forbids the relief sought.

A. Congress Could Not Have Intended to Allow Easy Evasions of Its Conscious Effort to Centralize Tucker Act Cases in the Claims Court and the Federal Circuit

In the Tucker Act and the Federal Courts Improvement Act, Congress has decreed that the Claims Court – and on appeal the Federal Circuit – shall have exclusive jurisdiction of claims in excess of $10,000 against the United States. See note 9, *supra;* pp. 14-15, *supra.*[32] The purpose of these Acts clearly was to centralize all large monetary claims against the United States – claims that before the enactment of the Tucker Act and its predecessors would have been considered by Congress itself – in a single trial court and a single appellate court. See *United States* v. *Hohri*, No. 86-510 (June 1, 1987), slip op. 7 (recognizing that purpose of Federal Courts Improvement Act is to ensure uniformity of results in nontort actions against the United States); cf. *United States* v. *Fausto*, slip op. 9, 11-12 (recognizing congressional purpose to ensure consistency of interpretation by centralizing civil service cases in Federal Circuit); *id.* at 11 (noting that Tucker Act cases are similarly centralized). See generally *Glidden Co.* v. *Zdanok*, 370 U.S. at 552-558 (discussing historical role of Court of Claims to provide relief as substitute for private relief bills passed by Congress);

[32] Of course, there are statutes – not at issue here – in which Congress has permitted *specified* monetary claims against the federal government to be pursued in district courts rather than in the Claims Court. See, *e.g.*, 42 U.S.C. 405(g); 42 U.S.C. (& Supp. III) 1395*oo*(f); 42 U.S.C. 2000e-16. No such specific waiver of sovereign immunity is involved in this case.

id. at 566 (noting "lively attention" given by Congress to work of Court of Claims).

The claim splitting sanctioned by the court of appeals threatens to undermine this legislative objective. As the court of appeals construed the Tucker Act, any time a plaintiff appends a claim for prospective relief to a Tucker Act claim for monetary damages, the case must be bifurcated, with the district court and the regional court of appeals resolving any and all legal issues common to both claims for relief. This resolution of all common legal issues, according to the court of appeals, is then binding on the Claims Court by operation of collateral estoppel.[33] Rather than preserving the role of the Claims Court as the single tribunal charged with the uniform resolution of all legal issues presented in such cases, this construction promises to disperse legal actions against the United States for money across every district court in the land and twelve different regional judicial circuits. As the Fifth Circuit has observed, "asking for 'more' relief where monetary relief will satisfy the claimant's needs cannot defeat the jurisdictional scheme set up by Congress – to centralize money claims against the government, except those claims under $10,000 and those sounding in

[33] The court appears to have misunderstood the usual rules of preclusion, which are generally designed to *prohibit* claim splitting. See 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.405[3], at 192 n.2 (2d ed. 1984) ("The principle that a plaintiff may not assert grounds for recovery that he could have asserted in a prior suit resolved by final judgment derives from the rule against splitting a single cause of action."); see also *id.* ¶ 0.410[1]; *Alyeska Pipeline Service Co.* v. *United States*, 688 F.2d 765 (Ct. Cl. 1982), cert. denied, 461 U.S. 943 (1983); *Boruski* v. *United States*, 493 F.2d 301 (2d Cir.), cert. denied, 419 U.S. 808 (1974). If respondent had brought only its prospective claims in district court, forgoing its Tucker Act claims, the district court might well have had jurisdiction (see note 11, *supra*), but ordinary principles of res judicata would have precluded respondent from maintaining a separate action for money damages at all, let alone maintaining an action in which the government would be collaterally estopped from contesting liability. Here, of course – as both we and respondent have previously emphasized (Pet. 23 n.17; 87-929 Cross-Pet. 7) – it is the court of appeals, not respondent, that has split the claims.

tort, in the Claims Court" (*Amoco Prod. Co.*, 815 F.2d at 367; accord *Portsmouth Redevel.*, 706 F.2d at 474).[34]

Ironically, under the approach taken by the court of appeals, a plaintiff who improperly brings a Tucker Act claim for more than $10,000 in district court may obtain an adjudication of the merits of his claim, and review in the regional court of appeals, so long as he also requests "prospective" relief. But cf. *United States* v. *Fausto*, slip op. 11 ("a Tucker Act action is appealable to the Federal Circuit, regardless of whether it is brought in the Claims Court or the district court"). But a plaintiff who properly brings a Little Tucker Act action in district court must pursue or defend any appeal in the United States Court of Appeals for the Federal Circuit, whether or not he also requests prospective relief. That is because, under 28 U.S.C. 1295(a)(2), the Federal Circuit has exclusive jurisdiction over any final decision of a district court "if the jurisdiction of that court was based, *in*

[34] In this case in particular, "prospective" relief is not so much a legitimate need of the plaintiff as it is an excuse for the district court and court of appeals to decide the merits of the legal issues underlying the money claims, over which they lack jurisdiction. Under our system of law, all judicial and administrative decisions stand as precedents for later cases. All decisions, therefore, have some potential future effect, even if the controversy they actually resolve pertains entirely to past events. The controversy resolved at the administrative level in this case pertained to Medicaid funding for the years 1978-1982, and the *only* future effect of the GAB decisions is that they stand as precedents. See Pet. App. 4a (administrative disallowance decisions, which necessarily concern money past due, are precedents used "to implement important policies concerning ongoing programs"). A Claims Court decision awarding respondent money on the ground that the GAB was wrong, or a decision denying respondent such an award on the ground that the GAB was right, would have a precedential effect precisely parallel to that of the administrative decisions. Yet the court of appeals deprived the Claims Court of any opportunity to decide that question by maintaining that the precedential effect of the GAB decisions justifies an assertion of jurisdiction by a federal district court and that the district court's decision, as affirmed by the court of appeals, would collaterally estop the losing party from relitigating the merits before the Claims Court.

whole or in part," on the Little Tucker Act (emphasis added). Cf. *United States* v. *Hohri, supra.* It is exceedingly difficult to believe that Congress, whose very strong desire to centralize the adjudication of Tucker Act claims has been recognized by this Court (*Hohri*, slip op. 6-8 & n.4), intended that this purpose could be so easily bypassed in Big Tucker Act cases through the device of claim splitting.[35]

Claim splitting not only undermines the central role of the Claims Court, it generates delay, duplication of effort, confusion, and conflict. Under the rationale of the court of appeals, if the plaintiff proceeds in the district court and prevails, then a second action must be brought in the Claims Court. As a result, every lawsuit against the United States that involves claims to both prospective and retrospective relief has the potential of multiplying into two lawsuits. This inevitably creates additional delay and waste of resources, both judicial and otherwise.[36] Furthermore, if the district court and/or regional court of appeals decide all common issues in the case, and if collateral estoppel is applied in the way the court of appeals assumed it would be, additional problems would arise in applying those

[35] Indeed, the judgment below, by allowing the jurisdiction of the Claims Court to be defeated by artful pleading in any case involving an ongoing or potentially repetitious dispute, threatens to reduce the Claims Court to the role of a mere paymaster. This Court has previously rejected attempts to defeat the sovereign immunity of the United States by the subterfuge that a " 'judicial ascertainment' of credits" is somehow different from a "judgment" against the United States. *United States* v. *Shaw*, 309 U.S. 495, 504 (1940). It should do so here as well, by construing the Tucker Act to mean that the exclusive jurisdiction of the Claims Court extends to any case that *includes* a Tucker Act claim for money damages against the United States.

[36] For example, see *Smith* v. *United States*, 654 F.2d 50 (Ct. Cl. 1981) (refusing to accept district court's transfer of backpay portion of reinstatement-and-backpay case); *Hondros* v. *Civil Serv. Comm'n*, 720 F.2d 278 (3d Cir. 1983) (resolving merits of same case in reinstatement context); *id.* at 299 n.40 (views of Chief Judge Seitz) (disagreeing with decision of Court of Claims not to accept jurisdiction); *id.* at 302-303 (Adams, J., concurring) (agreeing with decision of Court of Claims not to accept jurisdiction); *Smith* v. *United States*, 832 F.2d 523 (Fed. Cir. 1987) (14 years after the events in question, and at least 11 years after litigation began, finally resolving the merits of plaintiff's backpay claim for his removal from position as a deputy marshal).

general legal principles to specific claims for monetary relief. In contrast to the usual situation in which a court of appeals decides controlling legal issues and remands to a lower court, which is subject to its review and supervision, here the application of general principles to specific facts is entrusted to the Claims Court, which is subject to review only by the Federal Circuit. Thus the claim-splitting solution endorsed by the court of appeals would create not only delay and duplication of effort, but also a serious potential for intercircuit friction and conflict.

Finally, the judgment of the court of appeals gives rise to new opportunities for forum shopping. Under that court's construction of the Tucker Act, plaintiffs who have Tucker Act claims have the option, in all but the rare case in which the lawsuit focuses exclusively on past, nonrecurring events, of obtaining an adjudication on the merits in either the Claims Court and the Federal Circuit, or a district court and its regional circuit. Thus, if a plaintiff thinks a particular district court or regional court of appeals will be more sympathetic to his claim than the Claims Court, he can file an action for a declaratory judgment in district court, and if successful, use collateral estoppel to convert a favorable judgment into a collection action in the Claims Court. Cf. *Green* v. *Mansour*, 474 U.S. 64, 73 (1985) (condemning similar attempt to obtain money judgment in state court by first obtaining declaratory judgment in federal court, given state's Eleventh Amendment immunity from award of money damages directly by federal court). Conversely, if a plaintiff thinks the Claims Court will be more sympathetic than a district court, he can go first to the Claims Court, and have the central legal issues resolved there. We submit that no legitimate interest of any party or of the judicial system requires such a result.

In light of all these practical objections to claim splitting, this Court should sanction such a procedure only if faced with the clearest evidence that Congress intended to require it. Yet there is no such positive evidence, clear or otherwise.[37] In fact, as we

[37] There is absolutely no indication that Congress ever intended to permit claim splitting. Indeed, the Judicial Code strongly suggests that Congress regarded it as undesirable. See 28 U.S.C. 1500 ("The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who * * * [was] acting or professing to act * * * under the authority of the United States."). The courts that have permitted claim splitting seem to regard it as a curious side effect of the interaction of the Administrative Procedure Act and the Tucker Act (see Pet. App. 5a-6a), not as a procedure that Congress ever considered and intended.

now show, the limitations of the APA support the view that Congress has actually forbidden claim splitting.

B. The Administrative Procedure Act Does Not Waive Sovereign Immunity for a "Prospective" Action Because the Tucker Act Provides an "Adequate Remedy in a Court"

Respondent's effort to obtain resolution of its "prospective" claims in district court, like its effort to obtain resolution of its monetary claims in district court, is barred by 5 U.S.C. 704. Courts have often recognized that resolution of a Tucker Act suit in the Claims Court can be an "adequate remedy" that precludes APA review.[38] This is so even though APA review, if allowed, might afford forms of relief that are unavailable in the Claims Court. The legislative history of the 1976 amendments to the APA, although it came long after the enactment of Section 704, supports the view that the availability of a Tucker Act remedy had previously been and should continue to be recognized as a basis for denial of relief under the APA.[39]

[38] *American Science & Eng'g, Inc.* v. *Califano*, 571 F.2d 58, 62-63 & n.6 (1st Cir. 1978); *Alabama Rural Fire Ins. Co.* v. *Naylor*, 530 F.2d 1221, 1230 (5th Cir. 1976); *International Eng'g Co.* v. *Richardson*, 512 F.2d 573, 580-581 (D.C. Cir. 1975), cert. denied, 423 U.S. 1048 (1976); *Warner* v. *Cox*, 487 F.2d 1301, 1304, 1306 (5th Cir. 1974). Results similar to the results in these cases have been reached, without relying on Section 704, in *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986), and *North Side Lumber Co.* v. *Block*, 753 F.2d 1482, 1485 (9th Cir.), cert. denied, 474 U.S. 931 (1985). In those cases, the courts have treated the Tucker Act as a statute that "impliedly forbids" an APA action within the meaning of Section 702(2), rather than a statute that provides an "adequate remedy" within the meaning of Section 704.

[39] In addition to the views expressed in note 23, *supra*, Professor Cramton's memorandum submitted at the 1970 hearing supports the position that the adequacy of a Tucker Act remedy is a basis for dismissal of an action purporting to be brought under the APA. See *1970 Hearing* 132.

At least in the circumstances of this case, respondent's Tucker Act remedy would be fully adequate. First, this is simply a dispute about a stream of money payments over time.[40] In such a case, final resolution of the legal dispute by the Claims Court will accomplish all of the plaintiff's litigation objectives: if the plaintiff prevails, it gets back all of the past-due money to which it is entitled, and it obtains a statement of the law that will bind the federal government in its future dealings with the plaintiff. See generally *Amoco*, 815 F.2d at 367; *Cook* v. *Arentzen*, 582 F.2d at 878 n.6. Second, although the Claims Court generally lacks the power to grant declaratory and injunctive relief as such, Congress has explicitly given it the power "to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just" (28 U.S.C. 1491(a)(2)). Thus, in any case (such as this one) involving review of agency action there is little basis for any fear that a plaintiff forced to litigate its entire case in the Claims Court will ever receive less than adequate relief.

In short, under the Tucker Act respondent could have brought its action in the Claims Court. Because this action was "an adequate remedy in a court," nonstatutory review under the APA was precluded by 5 U.S.C. 704, and the only applicable waiver of sovereign immunity was that provided by the Tucker Act. The Claims Court therefore had exclusive jurisdiction over the entire controversy.

C. The Administrative Procedure Act Does Not Waive Sovereign Immunity for a "Prospective" Action Because the Tucker Act "Impliedly Forbids the Relief Which Is Sought"

Even if it were determined that a Tucker Act action in the Claims Court would somehow offer respondent less than "ade-

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[40] Cf. *Warner* v. *Cox*, 487 F.2d at 1304 (in holding that plaintiff's exclusive remedy for alleged nonpayment of money due under an ongoing contract with the federal government was an action under the Tucker Act, the court observed that "[n]one of the substantive claims presented to the court below concerned anything but the payment of money – when, how much, and by whom it should be paid").

quate" relief, it still would not follow that respondent had the right to supplement its Tucker Act remedies with an action under the APA in the district court. In addition to the limitations on nonstatutory review contained in Section 704, 5 U.S.C. (Supp. IV) 702(2) forbids APA courts to grant relief "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

The Tucker Act is certainly a statute that may – by denying the Claims Court the ability to award a particular remedy – "impliedly forbid[]" such relief under the APA. See *Sharp* v. *Weinberger*, 798 F.2d at 1523-1524; *Spectrum Leasing Corp.* v. *United States*, 764 F.2d 891, 892-893 (D.C. Cir. 1985); *Ramirez de Arellano* v. *Weinberger*, 745 F.2d at 1553 (Scalia, J., dissenting); *North Side Lumber Co.* v. *Block*, 753 F.2d 1482, 1485 (9th Cir.), cert. denied, 474 U.S. 931 (1985); see also Cramton, *supra*, 68 Mich. L. Rev. at 433-436. If Congress has denied the Claims Court the power to render certain kinds of judgments in cases involving money disputes, that is a legislative judgment deserving the courts' respect, not a defect for courts to remedy by permitting an action under the APA to afford more complete or perfect relief. But see, *e.g.*, *Rowe* v. *United States*, 633 F.2d at 802 (treating limited equitable powers of the Court of Claims as a justification for claim splitting).

In the present case, the remedial powers of the Claims Court, when and if this case comes before it, will be limited to the power to render a money judgment and the limited power of remand to the agency that is given by 28 U.S.C. 1491(a)(2). The court will not have the power to issue a declaratory judgment that the GAB has misconstrued the law, or to enjoin petitioners henceforth to construe the law differently when dealing with respondent.[41] See generally *Richardson* v. *Morris*, 409 U.S. 464,

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[41] Petitioners and their successors in office would, however, presumably be bound by collateral estoppel from relitigating against respondent any disputed issues of law or fact actually decided by the Claims Court and not reversed, modified, or rendered irrelevant by subsequent review. Compare *Montana* v. *United States*, 440 U.S. 147 (1979) (collateral estoppel available against United States in favor of one who was a party to a prior proceeding), and *United States* v. *Stauffer Chem. Co.*, 464 U.S. 165 (1984) (collateral estoppel against

465 (1973); *United States* v. *King*, 395 U.S. 1, 4-5 (1969). But even indulging in the dubious premise that such orders have any meaning to respondent—other than as a hook from which to hang a jurisdictional cloak—the proper conclusion to draw would be that they are forms of relief impliedly forbidden by the Tucker Act, not forms of relief that *must* be available in district court because they are not available under the Tucker Act.

In sum, the APA is a statute designed to provide remedies in cases that the Tucker Act does not touch, and the 1976 amendments to the APA were never intended to create a scheme to circumvent or supplement the Tucker Act and its limitations. Respondent's proper remedy, if respondent has a valid complaint under the Medicaid statute and does not wish to waive its accrued monetary claims, lies entirely in the Claims Court under the Tucker Act, not in the district court. The complaints were filed in the wrong court, and the judgments of the court of appeals, to the extent that they validate that court's exercise of jurisdiction, should be reversed.

United States extends to issues of law as well as issues of fact), with *United States* v. *Mendoza*, 464 U.S. 154 (1984) (collateral estopel not available against United States in favor of one who was not a party to a prior proceeding).

CONCLUSION

The judgments of the court of appeals should be affirmed in part and reversed in part, and the cases should be remanded with directions to vacate the judgments of the district court in their entirety and transfer the cases to the Claims Court pursuant to 28 U.S.C. 1631.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

OTIS R. BOWEN,
SECRETARY OF HEALTH AND HUMAN
SERVICES, et al., Petitioners
v.
COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS,
Cross-Petitioner
v.
OTIS R. BOWEN,
SECRETARY OF HEALTH AND HUMAN
SERVICES, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS, RESPONDENT/ CROSS-PETITIONER

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139 pp

QUESTION PRESENTED

Whether the United States District Court has authority under 28 U.S.C. § 1331, and 5 U.S.C. § 702, to review a decision by the Secretary of Health and Human Services to deny reimbursement under the Medicaid Act for the federal share of services provided by Massachusetts to its mentally retarded citizens.

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	
Introduction	1
The Medicaid Act	4
The Massachusetts Disallowance	10
Prior Judicial Proceedings	14
SUMMARY OF ARGUMENT	21
ARGUMENT	
I. DISTRICT COURT REVIEW OF THE FINAL DECISION OF THE SECRETARY TO DENY MEDICAID REIMBURSEMENT IS AUTHORIZED BY THE ADMINISTRATIVE PROCEDURE ACT.	32
A. The Nature of this Case and the Decision of the Secretary to be Reviewed Support District Court Jurisdiction.	32

PAGE

B. The APA's Broad Waiver of Sovereign Immunity Encompasses the Commonwealth's Complaint for Judicial Review. 48

1. Section 702 Waives Sovereign Immunity for a Broad Range of Agency Action Including Grant Disallowances. 48

2. The Common-wealth's Case is for Judicial Review, Not "Money Damages." 59

3. The Tucker Act Does Not Create an "Adequate Remedy" in the Claims Court that Bars District Court Review. 69

C. The Social Security Act and the Federal Courts Improvement Act Support District Court Review of Grant Disallowances. 78

PAGE

II. THE TUCKER ACT DOES NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION OF THIS CASE. 94

A. The Tucker Act Does Not Confer Jurisdiction on the Claims Court Over This Case. 94

B. Even if the Tucker Act Applies to Some Portion of this Case, It Does Not Deprive the District Court of Jurisdiction. 100

CONCLUSION 105

TABLE OF AUTHORITIES

Cases	PAGE
Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)	49, 50
County of Alameda v. Weinberger, 520 F. 2d 344 (9th Cir. 1975)	51, 53, 103
Amoco v. Hodel, 815 F. 2d 352 (1987)	45
Bell v. New Jersey, 461 U.S. 773 (1983)	51, 84n
Bennett v. Kentucky Dept. of Education, 470 U.S. 656 (1985)	34, 39, 66
Block v. Community Nutrition Institute, 467 U.S. 340 (1984)	32, 49, 90
Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986)	50
School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359 (1985)	63n, 93n
Califano v. Sanders, 430 U.S. 99 (1977)	48

	PAGE
Colorado Dept. of Social Services v. HHS, 558 F. Supp. 337 (D. Colo. 1983), aff'd 771 F. 2d 1422 (10th Cir. 1985)	52
Connecticut v. Schweiker, 557 F. Supp. 1077 (D. Conn. 1983), rev'd, 731 F. 2d 1052 (2d Cir. 1984), aff'd, Connecticut Department of Income Maintenance v. Heckler, 471 U.S. 524 (1985)	5, 17n, 37, 52
Delaware Div. of Health v. U.S. Dept. of Health and Human Services, 665 F. Supp. 1104 (D. Del. 1987)	54, 98
Dermott Special School District v. Gardner, 278 F. Supp. 687 (E.D. Ark. 1968)	57n
Director, Office of Worker's Compensation v. Perin North River Associates, 459 U.S. 297 (1983)	90
Duke Power Co. v. Carolina Environment Study Group, 438 U.S. 59 (1978).	104n
Eastport S.S. Corp. v. U.S., 372 F. 2d 1002 (Ct. Cl. 1967)	97n
Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)	62n
Feres v. United States, 340 U.S. 135 (1950)	78

	PAGE
State of Georgia v. Califano, 446 F. Supp. 404 (N.D. Ga. 1977)	53
Grimesy v. McMahon, No. 87-1228 (pending in Federal Circuit)	92n
Hahn v. United States, 757 F. 2d 581 (3d Cir. 1985)	103n
Hambsch v. United States, 12 Cl. Ct. 744 (1987)	97n
Harris v. McRae, 448 U.S. 297 (1980)	5, 99
Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176 (1982)	93n
Illinois v. Schweiker, 707 F. 2d 273 (7th Cir. 1983)	9n, 52
Kelly v. Robinson, No. 85-1033 (November 12, 1986)	62n
Lee v. Thornton, 420 U.S. 139 (1975)	75
Lee County Special School Dist. No. 1 v. Gardner, 263 F. Supp. 26 (D.S.C. 1967)	57n
Ludecke v. Watkins, 335 U.S. 160 (1948)	90

	PAGE
Maryland v. Dept. of Health and Human Services, 763 F. 2d 1441 (D.C. Cir. 1985)	54, 68n, 95, 98
Commonwealth of Massachusetts v. Dept. Grant Appeals Board, 815 F. 2d 778 (1987)	67, 71
Massachusetts v. Heckler, 576 F. Supp. 1565 (D. Mass.), rev'd on other grounds, 749 F. 2d 89 (1st. Cir. 1984), cert. denied, 472 U.S. 1017 (1985)	17n
Massachusetts v. Grant Appeals Board, 698 F. 2d 22 (1st. Cir. 1983)	8, 9n, 17n, 83
Megapulse, Inc. v. Lewis, 672 F. 2d 959 (D.C. Cir. 1982)	45
Michigan v. Secretary of Health and Human Services, 563 F. Supp. 797 (W.D. Mich. 1983), aff'd, 744 F. 2d 32 (6th Cir. 1984)	53
Minnesota v. Heckler, 718 F. 2d 852 (8th Cir. 1983)	53n
Murray v. U.S., 817 F. 2d 1580 (Fed. Cir. 1987)	97n
New Jersey v. Dept. of HHS, 670 F. 2d 1284 (3d Cir. 1982)	9n
State of Ohio v. Dept. of HHS, 761 F. 2d 1187 (6th Cir. 1987)	82

PAGE

Oregon Department of Human Resources v. Dept. of Health and Human Services, 727 F. 2d 1411 (9th Cir. 1983) 53

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1978) 84n

Richardson v. Morris, 409 U.S. 464 (1973) 57n, 73

Schweiker v. Gray Panthers, 453 U.S. 34 (1981) 79, 92

Smith v. United States, 654 F. 2d 50 (Ct. Cl. 1981) 76

Spectrum Leasing Corp. v. United States, 764 F. 2d 891 (D.C. Cir. 1985) 45, 73

United States v. Hohri, No. 86-510 (June 1, 1987) 88n, 91

United States v. King, 395 U.S. 1 (1969) 73, 97

United States v. Mitchell, 463 U.S. 206 (1983) 97, 98

United States v. Mottaz, 476 U.S. 834 (1986) 33, 98

United States v. Testan, 424 U.S. 392 (1976) 96, 97

PAGE

Virginia v. Bowen, No. 84-1171-R (W.D. Va. February 3, 1988) 54

Constitutional Provisions

U.S. Constitution:

Art. I 74n

Art. III 84n

Statutes and Regulations

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

5 U.S.C. § 701(a) 49, 50
5 U.S.C. § 702 passim
5 U.S.C. § 702(2) 101, 102, 103
5 U.S.C. § 703 14
5 U.S.C. § 704 passim
5 U.S.C. § 706 passim

Education for All Handicapped Children Act, 20 U.S.C. §§ 1401 et seq. 93n

Elementary and Secondary Education Act of 1965 51

Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 26, 72n, 85, 86

Federal Grant and Cooperative Agreement Act, P.L. 95-224 39n

PAGE

Social Security Act, 42 U.S.C. §§ 301 et seq.

Tit. II, 42 U.S.C. §§ 401 et seq.:

42 U.S.C. § 405(g) 81

Tit. XI, 42 U.S.C. § 1301 et seq.:

42 U.S.C. § 1316 7

42 U.S.C. § 1316(a)(3) 8, 82

42 U.S.C. § 1316(d) 8, 51

Tit. XVIII, 42 U.S.C. §§ 1395 et seq.:

42 U.S.C. § 1395oo(f) 81

Tit. XIX, 42 U.S.C. §§ 1396-1396q 4

42 U.S.C. § 1396 4, 5, 99

42 U.S.C. § 1396a(a) 6

42 U.S.C. § 1396b 6

42 U.S.C. § 1396b(1) 6

42 U.S.C. § 1396b(d) 65

42 U.S.C. § 1396(d) 40

42 U.S.C. § 1396c 7, 81

42 U.S.C. § 1396d(b) 7n

PAGE

Tit. XX, 42 U.S.C. §§ 1397 et seq. 80

Tucker Act:

28 U.S.C. § 1346(a)(2) 2
28 U.S.C. § 1491 passim
28 U.S.C. § 1491(a)(2) 76
28 U.S.C. § 1491(a)(3) 76n

Pub. L. No. 92-415, 86 Stat. 652 (1972) 74

Pub. L. No. 94-574, 90 Stat. 2721 (1976) 55

Pub. L. No. 95-224, 92 Stat. 3 (1974) 39n

28 U.S.C. § 1331 3, 14, 51, 55, 57

28 U.S.C. § 1295(a)(2) 88n

28 U.S.C. § 1295(a)(3) 72n

42 C.F.R. § 441.13(b) 12

45 C.F.R. § 201.3 82n

45 C.F.R. § 201.4 83n

45 C.F.R. § 201.7 83n

PAGE

Miscellaneous

Administrative Procedure Act: Legislative History, S. Doc. 248, 79th Cong. 2d Sess. (1946) 71

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Collateral Relief in the Court of Claims: Hearings on H.R. 12392 Before Subcomm. No. 2 of the House Comm. on the Judiciary, 92d Cong., 2d. Sess. (1972) 75n

121 Cong. Rec. 29,995 (1975) 64

K. Davis, Administrative Law, (2d ed. 1983) 51

K. Davis, Administrative Law Treatise (Supp. 1982) 58

Federal Courts Improvement Act of 1981: Hearings on S. 21 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 94th Cong., 1st. Sess. (1981) 86n

H.R. Rep. 92-1023, 92d Cong., 2d Sess. (1972) 74n, 75

H.R. Rep. 94-1656, 94th Cong., 2d Sess. (1976) 55, 56, 65, 102

PAGE

H.R. Rep. 97-312, 97th Cong., 1st Sess. (1981) 86n

S. 1704, 90th Cong., 2d Sess. (1968) 74n

S. Rep. 1465, 90th Cong., 2d Sess (1968) 74n

S. Rep. 92-1066, 92d Cong., 2d Sess. (1972) 74n, 75

S. Rep. 93-1239, 93d Cong., 2d Sess. (1974) 39n

S. Rep. 94-996, 94th Cong., 2d Sess. (1976) 55, 56, 58

S. Rep. 96-304, 96th Cong., 88

S. Rep. 97-275, 97th Cong., 1st Sess. (1981) 86n, 87, 88, 89n

Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 91st. Cong., 2d Sess. (1970) 64

1987 Statistical Abstract of the United States 39

C. Wright, Law of the Federal Courts (3d ed. 1976) 51

Nos. 87-712 and 87-929

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

OTIS R. BOWEN,
SECRETARY OF HEALTH AND HUMAN
SERVICES, et al., Petitioners

v.

COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS,
Cross-Petitioner

v.

OTIS R. BOWEN,
SECRETARY OF HEALTH AND HUMAN
SERVICES, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS, RESPONDENT/ CROSS-PETITIONER

STATEMENT OF THE CASE

Introduction

The Commonwealth of Massachusetts challenges two adjudicatory decisions of the Secretary of Health and Human Services which "disallowed" reimbursement under the Medicaid Act for medical and rehabilitative services provided to mentally retarded persons. The Commonwealth sought judicial review of those decisions in the customary forum, the United States District Court, pursuant to 5 U.S.C. § 702 and 706. That court reviewed the administrative record under familiar standards, determined that the Secretary had misinterpreted the Medicaid Act, and "reversed." Pet. App. 32a. The court of appeals upheld the district court's interpretation of the Medicaid Act. The Secretary, however, departing from settled interpretations of the statutes governing judicial review of his decisions, and from his own previous representations to federal courts throughout the country, argued on appeal that the district court lacked jurisdiction over the case.

The court of appeals affirmed the district court's jurisdiction to review the disallowance and to grant related injunctive and declaratory relief as to the "prospective" and "ongoing" relationship between the Commonwealth and the Secretary. But the court of appeals also opined that, under the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491, only the

United States Claims Court would have jurisdiction to order the Secretary to reimburse Massachusetts for past services. Thus, the court advised that if the Secretary should fail to provide reimbursement in the wake of its ruling on the merits, Massachusetts' recourse would be in the Claims Court.

Massachusetts maintains that under 28 U.S.C. § 1331 and 5 U.S.C § 702, Congress designated the district court as the forum for judicial review of final agency action such as the decision of the Secretary in this case. We will meet the Secretary's novel reading of the relevant statutes and their legislative histories on their merits. The fundamental point is that the Secretary's highly technical approach should not be

permitted to obscure the essence of the Commonwealth's complaint. That complaint is nothing more or less than a petition for judicial review of an agency decision, over which Congress conferred jurisdiction in the district court.

The Medicaid Act

Congress created the Medicaid program in 1965 as Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396q. See 79 Stat. 343 (the Medicaid Act). The purpose of the Medicaid Act is to encourage and assist the States to provide health care for their needy, aged, disabled and dependent citizens. 42 U.S.C. § 1396; Connecticut Department of Income

Maintenance v. Heckler, 471 U.S. 524, 528-9 (1985). The Court has described the Medicaid program as "a cooperative endeavor in which the Federal Government provides financial assistance to participating states to aid them in furnishing health care to needy persons." Harris v. McRae, 448 U.S. 297, 308 (1980). The program is one of "cooperative federalism," in which the Federal Government agrees to pay a specified percentage of the total amount expended under the Medicaid plan submitted by the State and approved by the Secretary. Id.

The Act "authorize[s] to be appropriated for each fiscal year a sum sufficient to carry out [its] purposes. . . ." 42 U.S.C. § 1396. The Act provides that the federal government will share the

cost of "medical assistance" and "rehabilitation and other services to help [eligible individuals] attain or retain capability for independence or self-care . . . ." Id.

To qualify for federal Medicaid grants, a State is required to submit a "state plan for medical assistance" to the Secretary. 42 U.S.C. §§ 1396a(a) and 1396b(1). The plan sets forth, among other things, standards of eligibility and descriptions of covered services. Upon the approval of a state plan, the Secretary must pay the federal share of covered services to the state. 42 U.S.C. § 1396b; Pet. App. 9a.[1/]

1/ The Medicaid Act defines "medical assistance" to mean, among other things, "payment of part or all of the cost of

(footnote continued)

The Secretary's principal powers of oversight under the Medicaid Act are two: (1) the disallowance of reimbursement for specific State expenditures, and (2) the determination that a State plan, or its administration of its plan, fails to comply with the Act. See 42 U.S.C. §§ 1316, 1396c. Initially these powers were seen to be distinct. The former power was understood to be retroactive and narrowly focused, and to involve mainly technical audit issues. The latter power was understood to be prospec-

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(footnote continued)

. . . intermediate care facility services." 42 U.S.C. § 1396d(b). The court of appeals noted, correctly, that "intermediate care facility services include both 'health' and 'rehabilitative' services." Pet. App. 10a.

tive and to involve important issues of statutory interpretation and policy. Reflecting this understanding, Congress provided for review of compliance decisions directly in the courts of appeals, 42 U.S.C. § 1316(a)(3), but left review of disallowance decisions (following administrative reconsideration, see 42 U.S.C. § 1316(d)),[2/] unspecified. See Commonwealth of Massachusetts v. Departmental Grant Appeals Board, 698 F. 2d 22, 24-26 (1st. Cir. 1983)(and cases

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2/ Section 1316(d) provides as follows: Whenever the Secretary determines that any item or class of items on account of which Federal financial participation is claimed under Title I, X, XIV, XVI, or XIX, of this chapter, or part A of subchapter IV of this Chapter, shall be disallowed for such participation, the State shall be entitled to and upon request shall receive a reconsideration of the disallowance.

collected). However, the disallowance procedure has increasingly been used to establish and enforce against the States the Secretary's view on significant issues of statutory interpretation and policy; and as so used, it has a powerful prospective, coercive effect. See Pet. App. 5a. [3/]

3/ This use of the disallowance power has required the regional courts of appeals to determine whether the States' challenges to disallowance decisions are actually compliance matters reviewable by the courts of appeals, since disallowances often involve important legal questions which are functionally or effectively similar to compliance decisions. See Commonwealth of Mass. v. Dept. Grant Appeals Board, 698 F. 2d at 26-27; New Jersey v. Dept. of HHS, 670 F. 2d 1284 (3d Cir. 1982); Illinois v. Schweiker, 707 F. 2d 273, 276 (7th Cir. 1983).

The Massachusetts Disallowance

Massachusetts first participated in the Medicaid program in 1966. Pet. App. 20a. Its plan for medical assistance has been approved by the Secretary. In accordance with its plan and the Medicaid Act, Massachusetts provides medical and rehabilitative services to eligible mentally retarded citizens who reside at state-owned and operated intermediate care facilities for the mentally retarded (ICF/MR's). Pet. App. 2a.

In 1982 and 1984, the Secretary disallowed reimbursement to Massachusetts for certain services provided to persons under the age of twenty-two years at Massachusetts ICF/MR's during the years 1978-1982. Pet. App. 2a-3a, 10a-11a,

40a, 53a. As the district court noted, the services in question were intended to "enable" the mentally retarded individuals "to achieve some degree of self-care." Pet. App. 26a-27a. The services included training mentally retarded individuals in "signal[ling] for food when . . . ready to eat to prevent aspiration of food into lungs; attending auditory stimulation for two minutes; locating hidden objects; showing preference for certain objects presented; and encouraging social interactions with adults." Pet. App. 26a and n. 7.

The Secretary declined to share the cost of these services. He did not find that Massachusetts had not provided the services, or that it had requested or received excess reimbursement. Rather,

the Secretary claimed that these services are not covered by Title XIX. He asserted that they constitute "education" and thus were ineligible for reimbursement under a regulation which provides that federal Medicaid reimbursement "may not include reimbursement for vocational training and educational activities." 42 C.F.R. § 441.13(b); Pet. App. 2a-3a, 10a-11a, 40a, 53a.

Massachusetts appealed both disallowances to the Board. Pet. App. 39a-84a. The Commonwealth's appeal did not dispute the proposition that if the services at issue were not covered by Title XIX, they were not reimbursable. Nor did the Commonwealth's appeal present an issue as to whether the services were actually provided, or as to the calculation of the

disputed amount. Rather, the only substantive issue presented to the Board was whether certain medical and rehabilitative services provided to the institutionalized mentally retarded are services covered by Title XIX. Pet. App. 39a-40a, 53a.

The Board heard witnesses, received documentary evidence, and heard argument of counsel. The Board "uph[e]ld" the disallowances, id. at 52a, 84a, and informed Massachusetts that the Board's decision "constitute[d] the final administrative action on this matter." J.A. 18.

Judicial Proceedings

Massachusetts sought review of the two decisions of the Board in the United States District Court for the District of Massachusetts. Pet. App. 89a-94a; 95a-99a. Each complaint sought "judicial review of a final decision" of the Board, Pet. App. 89a, 95a, and "declaratory and injunctive relief pursuant to 5 U.S.C. §§ 702, 703, and 28 U.S.C. § 2201, to determine the rights and obligations of the Commonwealth under the Medicaid program and to prevent the wrongful withholding of federal reimbursement." Pet. App. 90a, 96a.

The complaints invoked the subject matter jurisdiction of the district court under 28 U.S.C. § 1331, Pet. App. 90a,

96a, and alleged that the United States had "waived its immunity by 5 U.S.C. § 702." Id. at 90a, 96a. The Commonwealth claimed to be a "party aggrieved by the decision of the Board," and named as defendants, inter alia, "members of the panel of the Board which rendered the decision. . . ." Id. at 90a, 96a.

The body of each complaint described the Medicaid Act and the administrative proceedings which had preceded the two final decisions of the Board. Pet. App. 91a-92a, 97a-98a. The Commonwealth's claims included the familiar grounds for reversal of final federal agency action contained in 5 U.S.C. § 706: the complaint alleged that the Board's decisions were "based on errors of law", "arbitrary and capricious", "in excess of statutory authority", and "unsupported by substan-

tial evidence." Pet. App. 92a-93a, 98a. The prayers requested that the district court:

> 1. Enjoin the Secretary and the Administrator from failing or refusing to reimburse the Commonwealth, or from recovering from the Commonwealth, the federal share of expenditures for medical assistance to eligible residents of intermediate care facilities for the mentally retarded.
>
> 2. Set aside the Board's decision.
>
> 3. Grant such declaratory and other relief as the Court deems just.

Pet. App. 93a-94a, 98a-99a.

The Secretary answered the first complaint and asserted as a "defense" that the Board's decision was "supported by substantial evidence." (October 28, 1983); see J.A. 11, 28. He then filed a "Memorandum Concerning Subject Matter Jurisdiction." J.A. 19-22. In his memo-

randum the Secretary stated that "[a]s a matter of policy, HHS has decided not to press the defense of lack of jurisdiction in this action." J.A. 20.[4/] The dis-

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4/ The Secretary's explicit waiver of the jurisdictional issue in the district court (December 24, 1983, J.A. 20), was closely related to his representation to the First Circuit in an earlier case, Massachusetts v. Departmental Grant Appeals Board, 698 F. 2d 22, 26 (1st Cir. January 12, 1983)(holding that a petition for review under 42 U.S.C. § 1316(a)(3) actually concerned a disallowance, not a compliance matter), that he would not contest the district court's jurisdiction to review a disallowance decision. See Connecticut Dept. of Income Maintenance v. Heckler, 471 U.S. 524, 528 n. 8 (1985) (state had simultaneously sought review of a Board decision in both circuit and district courts). District Judge Garrity heard both Medicaid disallowance cases, and the Secretary advised the district court almost simultaneously in the two cases that he did not dispute its jurisdiction. See Massachusetts v. Heckler, 576 F. Supp. 1565, 1567 (D. Mass.), rev'd on other grounds, 749 F. 2d 89 (1st Cir. 1984), cert. denied, 472 U.S. 1017 (1985)

(footnote continued)

trict court nevertheless considered the question, since it was obliquely presented by the Secretary's advice, and ruled that it had jurisdiction. Pet. App. 37a-38a.

The Secretary and the Commonwealth filed cross-motions for summary judgment. J.A. 23-26. The Commonwealth moved the district court "to grant summary judgment in its favor and reverse the decision of the [Board]." Id. at 23. The Secretary moved the district court to "enter an Order affirming the decision of the [Board]." Id. at 25.

(footnote continued)

Thus, the Secretary has not simply changed his mind on this question; he has repudiated express representations both to the district court and to the court of appeals in this and a related case.

The district court granted summary judgment for Massachusetts, (Pet. App. 17a-31a), and entered a judgment that simply stated that the disallowance "is reversed." Id. at 32a. The district court entered neither an injunction nor a money judgment awarding damages.

On appeal to the First Circuit, the Secretary argued for the first time that the district court lacked subject matter jurisdiction. The court of appeals affirmed on the merits but vacated and remanded in part. The court determined that the district court could review the Secretary's decision and grant injunctive and declaratory relief since this "grant-in-aid dispute" has a "significant, prospective effect on the ongoing relationship between the federal agency and the affected state[.]" Pet. App. 5a. The

issue presented by the Commonwealth concerned the "scope of the Medicaid program, not just how many dollars Massachusetts should have received in any particular year." Pet. App. 5a. The court of appeals also hypothesized, however, that "[s]hould the Secretary persist in witholding reimbursement for reasons inconsistent with our decision, the Commonwealth's remedy would be a suit for money past due under the Tucker Act in the Claims Court[,]" where the doctrine of collateral estoppel would apply. Pet. App. 6a-7a. Thus the court of appeals addressed an issue not present in the case and held in substance that while the district court "had jurisdiction to review the disallowance decision of the Grant Appeals Board and to grant declara-

tory and injunctive relief," it could not "order the Secretary to pay the money." Pet. App. 6a. The court of appeals concluded that "the district court should send the case back to the Secretary for action consistent with the Medicaid Act as interpreted in this decision." Pet. App. 6a.

SUMMARY OF ARGUMENT

I.A. The nature of this case and the Secretary's decision demonstrate that the district court had jurisdiction. The Commonwealth's complaint is in its essence a suit for judicial review, and the judgment entered by the district court (reversal of the Secretary's decision denying Medicaid reimbursement)(Pet. App. 32a) was the only relief necessary

to accomplish the purpose of the suit. Whether or not the district court could enter a "money judgment" as such (a form of relief never sought by the Commonwealth nor entered by any court in this case), it was clearly empowered to "set aside" the decision of the Board under 5 U.S.C. § 706.

The jurisdiction of the district court is also supported by the nature of the Medicaid program and the Secretary's decision. The Secretary is a partner in a cooperative effort to provide vitally important services to needy people. Through the use of his disallowance power, however, the Secretary implements policies governing ongoing programs which can often result in the termination of services. For these reasons, Congress

intended to direct the important questions presented by Medicaid disallowances to the district courts and regional courts of appeals.

I.B. The broad waiver of sovereign immunity contained in the APA encompasses the Commonwealth's complaint for judicial review. The legislative history of the 1976 amendments and decisions of this Court demonstrate that the APA covers a broad range of actions seeking judicial review, including cases involving grant-in-aid programs. Relying upon these authorities, the federal courts have consistently held that, in a challenge to a Medicaid disallowance, a district court has jurisdiction notwithstanding that such judicial review might result in disbursement from the federal treasury.

Contrary to the Secretary's arguments, no other provision of the APA forecloses district court jurisdiction in this case. This case is a suit for judicial review, not "money damages." 5 U.S.C. § 702. The Secretary's mischaracterization is inconsistent with his apparent concession that actions which seek only review and relief as to future Medicaid services (while waiving rights to reimbursement for past periods) are not suits for "money damages," and are within the jurisdiction of the district courts. Neither logic nor the legislative history of the APA support this distinction. Indeed, the lengthy exerpts of the legislative history of the APA cited by the Secretary, in his effort to equate "money damages" with "monetary relief," are

beside the point because this action is in its essence one for nonmonetary relief. Furthermore, this Court has previously stated that "reimbursements" under a similar program are not "damages."

Nor is district court jurisdiction foreclosed by 5 U.S.C. § 704. Even assuming that some portion of this action is cognizable under the Tucker Act, the available remedies in the Claims Court are, by the Secretary's concession, inadequate in grant-in-aid cases, which affect vital services to needy persons and present important questions of statutory interpretation and social policy.

I.C. The APA and the Tucker Act should be construed so as to fit this case into the entire system of remedies

against the Government. The language and legislative history of related portions of the Social Security Act (SSA) and the Federal Courts Improvement Act of 1982 (FCIA) support district court jurisdiction of this case. The SSA and the FCIA demonstrate long-term and prevailing Congressional intent to vest power to review agency action under Title XIX and other titles of the SSA in the district courts and the regional courts of appeals, and to limit the creation and jurisdiction of "specialized" courts, particularly those created by the FCIA.

The district and circuit courts have developed substantial experience deciding cases involving grant-in-aid programs under the SSA and other statutes. In the Medicaid Act itself, Congress has authorized review in the courts of ap-

peals of closely-related "compliance" disputes between the States and the Secretary. Given this grant of authority, and the similarity of the legal questions presented by "compliance" and "disallowance" disputes, it is inconceivable that Congress intended review of disallowance matters in the Claims Court.

If the Congress that enacted the FCIA in 1982 believed that the Court of Claims already had jurisdiction to review scores of types of agency decisions, including those made in grant-in-aid programs under the Social Security Act, Congressional debate regarding specialized courts would have been pointless. Furthermore, by the time of the enactment of the FCIA, the lower courts had already determined the jurisdiction of the district courts over

Medicaid disallowances, and Congress in the FCIA expressed no dissatisfaction with those decisions.

Finally, it is reasonable to infer that the FICA preserved district and regional court of appeals review of cases such as the Commonwealth's because Congress was aware of (1) the inconvenience to needy persons and the States of litigating in the Claims Court, and (2) the expertise in the subject matter already developed by the district and regional courts of appeals.

II. A. The Secretary argues that if any aspect of the Commonwealth's case is within the jurisdiction of the Claims Court under the Tucker Act, then the district court lacks jurisdiction over the entire action, and, accordingly, the

court of appeals erred in concluding that such a case could be "bifurcated." This argument assumes that this case may be brought under the Tucker Act. But according to the Secretary, the term "money damages" in the APA also defines the limits of Tucker Act jurisdiction in the Claims Court, and we have shown that the Commonwealth's case is not one for "money damages." Alternatively, the Secretary's argument fails because, under the decisions of this Court, there is no cognizable "claim" under the Tucker Act unless a federal law mandates compensation for damages sustained. The Medicaid Act is not such a law. In arguing to the contrary, the Secretary has abandoned his statutory role as a partner in providing services to needy persons for a new role

as a paymaster. The Secretary's new incarnation cannot transform the federal share of reimbursement for services into "damages sustained" by a State and cognizable under the Tucker Act.

II. B. Finally, even assuming that the district court lacks jurisdiction over some aspect of a disallowance dispute, the Tucker Act does not deprive the district court of jurisdiction to review the Secretary's action, interpret applicable statutes and regulations, and grant appropriate declaratory and injunctive relief. If "bifurcation of claims" were to result, it would represent an inevitable and tolerable by-product of the relationship between the APA and the Tucker Act. Since the Secretary concedes that the district court has jurisdiction

to review disallowances upon a waiver of a claim for "money past-due," his concern for claim-splitting reduces to a policy concern best directed to Congress, not the Court.

ARGUMENT

I. DISTRICT COURT REVIEW OF THE FINAL DECISION OF THE SECRETARY TO DENY MEDICAID REIMBURSEMENT IS AUTHORIZED BY THE ADMINISTRATIVE PROCEDURE ACT.

A. The Nature of this Case and the Decision of the Secretary to be Reviewed Support District Court Jurisdiction.

1. The very nature of this case and the Secretary's decision demonstrate that the district court had jurisdiction. See Block v. Community Nutrition Institute, 467 U.S. 340, 345 (1984)(Congressional intent as to judicial review to be discerned from "the nature of the administrative action involved"). The Commonwealth's complaint is in its essence a suit for judicial review, and reversal of the Board's decision is the

only relief necessary to accomplish the purpose of the suit.

The case arose because of a specific, adjudicatory decision of the Grant Appeals Board, which held that certain services provided to the mentally retarded were not covered by Medicaid. In the district court, the Commonwealth sought review of the substantive validity of the Board's decision. The Commonwealth prayed the court to "set aside agency action," 5 U.S.C. § 706, the relief "characteristically provided" under administrative law. See United States v. Mottaz, 476 U.S. 834, 850 (1986). In fact, the Commonwealth sought the same review sought in similar grant contexts, where this Court has stated that "[in]

reviewing a determination . . . that a State has misused [federal] funds, a court should consider whether the findings are supported by substantial evidence and reflect an application of the proper legal standards." Bennett v. Kentucky Department of Education, 470 U.S. 656, 666 (1985)(citations omitted).

Because the Commonwealth's case was an action for judicial review, and not a claim for "money past due" or a "money judgment," an order "setting aside" the Board's decision would have provided the Commonwealth full relief. The Commonwealth (and the courts below) assumed that the Secretary would abide by the terms of the remand. Whether or not the district court could enter a money judgment as such (a form of relief never sought by the Commonwealth nor entered

by any court in this case), it was clearly empowered to "set aside" the decision of the Board, and to enforce that decision if the Secretary refused to abide by it.

The court of appeals agreed that the district court had the authority "to review the disallowance decision . . . and to grant declaratory and injunctive relief," Pet. App. 6a, and remanded the case to the Secretary for application of its interpretation of the Medicaid Act to the facts of this case. Pet. App. 7a n. 2, 16a. The Secretary does not directly contest the authority of the district court to reverse and remand. Sec. Br. at 12 n. 6. This is important because this disposition provided all of the relief necessary to accomplish the object of the Commonwealth's case. See

Sec. Br. at 15 n. 11. Upon remand, the Secretary (and the Board) are obliged to follow the interpretation of the Medicaid Act determined by the district court and affirmed by the court of appeals. Thus the authority of the district court invoked by the Commonwealth is that traditionally exercised in district court review of agency action.

Contrary to the opinion of the court of appeals, the Commonwealth neither sought nor obtained a "money judgment." Pet. App. 16a. It is true that the district court's opinion (as distinguished from its judgment) specifies relief that could be read as broader than necessary to grant the Commonwealth complete relief, see Pet. App. at 31a, but it does not need to be decided in this case

whether a State may obtain a judgment, broader than reversal, which finally determines that a service is reimbursable, and which orders the Secretary to make a specific adjustment in the State's grant account.[5/] In the ordinary review of a disallowance, such an order is not necessary to grant complete relief. See Connecticut v. Schweiker, 557 F. Supp. 677, 1091 (D. Conn. 1983)("this Court

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5/ But we note that such a determination is effectively the same thing as a determination that a service is covered by the Medicaid Act and state plan. If the Secretary had been upheld on the merits, the effect would be to deny services to recipients. It would be anomalous to hold that a question which may be litigated by recipents in the district courts may be litigated by the States only in the Claims Court. Apparently the Secretary agrees that the States may litigate in the district court, but he would exact the penalty that the States must waive their right to receive the federal share of past expenditures. Sec. Br. at 15 n. 11, 46.

trusts that HHS . . . will promptly restore any set-off already taken. An injunction is therefore unnecessary."). Certainly the bare possibility that the Secretary will contemn the judgment should not defeat the Court's jurisdiction to render it. In any event, in this case, the Court need only determine that the district court has jurisdiction to review and reverse a grant disallowance.

2. The authority of the district court under the Administrative Procedure Act is also supported by the nature of the Medicaid program and the Secretary's decision. Grant-in-aid programs to state and local governments represent the predominant portion of federal grant programs. The programs covered by such grants have increased in number and subject in the past twenty-five years.

See 1987 Statistical Abstract of the United States, Table Nos. 435-437.

"[F]ederal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." Bennett v. Kentucky Dept. of Education, 470 U.S. at 669. Disputes under the various programs often require the interpretation of extensive and complex statutes and federal regulations and present difficult public law questions of widespread interest and impact.6/

6/ In fact, the growth of these programs and the increase in federal-state disputes led Congress in 1974 to enact the Federal Grant and Cooperative Agreement Act, P.L. 95-224, 92 Stat. 3. The Act was intended to "distinguish federal assistance relationships from federal procurement relationships. . . ." Sec. 2(a); S. Rep. No . 93-1239, 93d Cong., 2d Sess. at 1, 3, 5, 9.

In the Medicaid program, the Secretary has asserted that his disallowance power extends beyond the offset of past overpayments against current payments, or similar routine adjustments. Such offsets would be a usual feature of a grant program. See, e.g., 2 R. Capalli, Federal Grants and Cooperative Agreements, §§ 8.13-8.16 (1982). The Secretary, however, claims the power to make a unilateral determination in a disallowance proceeding that a particular class of expenditure was not and is not in the future reimbursable. Thus, in these and previous disallowances, the Secretary has relied on section 1396(d) to disallow reimbursement for expenditures made in accordance with a state plan, on the

basis of his post hoc interpretations of Title XIX or HHS regulations.

The important policy implications of the Secretary's disallowances were evident to the court of appeals. Pet. App. 4a. The court noted that the "Secretary uses these decisions to implement important policies governing ongoing programs," and that a disallowance is a "statement of law governing the ongoing relationship between the Commonwealth and HHS." Id. at 4a, 5a. The Grant Appeals Board concurred in this view. Id. at 81a-82a ("Significant legal questions . . . can arise from disallowances based on audits.").

Thus the Secretary's decision may, and in this case does, have wide legal and human effect. As we demonstrate

below in Point I, B, Congress intended to direct these important questions to the district courts and regional courts of appeals.

3. The Secretary's brief ignores the nature of grant programs and disallowances, and mischaracterizes the relief which the Commonwealth sought and obtained. The Secretary erroneously claims that it is the Commonwealth's "view" that "the APA's waiver of sovereign immunity is broad enough to encompass both its claims for prospective relief and its claims for past-due money from the United States." Sec. Br. at 9. The Secretary essentially argues that any complaint which may incidentally require the disbursement of federal funds is a "claim against the United States" cognizable

only under the Tucker Act, 28 U.S.C. § 1491. The Secretary repeatedly claims that this is in essence an action simply to "enjoin" the payment of money. E.g., Sec. Br. at 9, 12, 21.

These are mischaracterizations of the Commonwealth's case. The Commonwealth neither makes a "claim" nor seeks a money judgment. It seeks reversal of an administrative decision.

To be sure, that remedy may have fiscal consequences. Any ultimate cost to the United States, however, is incidental to the relief sought in the petition for judicial review. Congress intended that jurisdiction depend on the essence of the final agency action and the nature of the review sought. Massachusetts alleges that the Secretary has made an unlawful decision, after an

adjudicatory proceeding, which has significance apart from the money involved in the period at issue. The fact that, under the Secretary's regulations, reimbursement ultimately may follow from the decision of the court does not deprive the district court of jurisdiction, because the Commonwealth did not seek a money judgment. So long as the complaint may be objectively read to be in essence a request for judicial review of an agency decision of this type, the district court has jurisdiction whether or not there could be incidental fiscal consequences.

This jurisdictional rule is no different from those applied by the federal courts to resolve other questions as to the respective jurisdictions of the

district court and the Claims Court. For example, when a court determines whether a claim is one "founded upon" a contract for purposes of the Tucker Act, the court examines "the source of the rights upon which plaintiff bases its claims, and upon the type of relief sought (or appropriate)." Spectrum Leasing Corp. v. United States, 764 F. 2d 891, 893 (D.C. Cir. 1985), quoting Megapulse, Inc. v. Lewis, 672 F. 2d 959, 968 (D.C. Cir. 1982). "A court will not find that a particular claim is one contractually based merely because resolution of that claim requires some reference to a contract." Spectrum Leasing Corp., 764 F. 2d at 893 (emphasis original). Similarly, this Court should not characterize this action as a "claim against the United States," or one for

"money past-due," merely because the action involves an identifiable amount of money. Indeed, unlike the contract cases cited above, resolution of this disallowance dispute does not require any "reference" to the money involved. Id.

The Secretary implies that these propositions, if accepted, will encourage "artful pleading" designed to mask "claims for money" as petitions for judicial review. See Sec. Br. at 18 n. 15, 22-23.[7/] The Commonwealth does not wish to encourage "artful pleading. "However, an objective assessment

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7/ There is an element of inconsistency in this position. The Secretary's Question Presented and portions of his argument repeatedly isolate one word ("enjoin")(Pet. App. 93a, 98a) from the Commonwealth's complaint to "prove" the

(footnote continued)

of this case by a court need not depend solely upon the form of the complaint. A challenge to an agency disallowance in the district court has a foundation in administrative law that is evident from an objective reading of the complaint and the nature of the agency decision under review.[8/]

(footnote continued)

alleged jurisdictional flaw in the entire action, while ignoring the essence of the Commonwealth's complaint. E.g., Sec. Br. at 4, 5, 12, 21. Elsewhere, however, the Secretary warns of the dangers of permitting jurisdiction to turn on "artful pleading." E.g., Sec. Br. at 22-23.

8/ This test is actually of the same type as that of the Fifth Circuit, (apparently endorsed by the Secretary) which determines whether an action is "in essence" one for "money damages." Amoco v. Hodel, 815 F.2d 352, 362 (1987).

B. The APA's Broad Waiver of Sovereign Immunity Encompasses the Commonwealth's Complaint for Judicial Review.

The language, legislative history, and purpose of the APA all support the jurisdiction of the district court over this case.

1. Section 702 Waives Sovereign Immunity for a Broad Range of Agency Action, Including Grant Disallowances.

The Administrative Procedure Act (5 U.S.C. §§ 701-706)(the APA) does not itself create subject-matter jurisdiction. Califano v. Sanders, 430 U.S. 99, 107 (1977). However, it supplies a general cause of action in favor of persons

aggrieved by final agency action. See Block v. Community Nutrition Institute, 467 U.S. 340, 345 (1984).

Section 702 of the APA provides that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." In previous administrative cases decided by the Court, in which an organic statute was silent on the subject of judicial review, the Court has applied a presumption that review is available in the district courts. See, e.g., Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967); 5 U.S.C. §§ 701(a), 702, 704. In such cases the Court has held that in the absence of any indication in a statute that the agency decision is

committed wholly to its discretion, or that review is otherwise precluded (see 5 U.S.C. § 701(a)), the decision is subject to judicial review in the district courts under 5 U.S.C. §§ 701-706. See, e.g., Bowen v. Michigan Academy of Family Physicians, 467 U.S. 667 (1986).

These holdings rest on the policies underlying the Administrative Procedure Act. "[T]he legislative material elucidating that seminal act manifests a congressional intention [to] cover a broad spectrum of administrative action[.]" Abbott Laboratories v. Gardner, 387 U.S. at 140. Relying in part upon Abbott Laboratories, the Court has observed in dicta, in a case involving a grant-in-aid program similar to Medicaid, that the district court has

jurisdiction over a State's challenge to a disallowance "under the general grant of jurisdiction over cases involving federal questions, 28 U.S.C. § 1331 (1976 ed., Supp. V)." Bell v. New Jersey, 461 U.S. 773, 777-8 n. 3 and 792 (1983)(disallowance under the Elementary and Secondary Education Act of 1965), citing K. Davis, Administrative Law § 23.5, p. 135 (2d ed. 1983); C. Wright, Law of the Federal Courts § 103 (3d ed. 1976).

As early as 1975, one court of appeals considered the text, legislative history, and policy of 42 U.S.C. § 1316(d), and ruled that Medicaid disallowances were reviewable in the district courts. County of Alameda v.

Weinberger, 520 F. 2d 344, 347-9 (9th Cir. 1975).[9/] Since Alameda, the lower federal courts have applied the same analysis and overwhelmingly concluded that judicial review of Medicaid disallowances is available in the district courts. Illinois v. Schweiker, 707 F. 2d 273, 275-277 (7th Cir. 1983); Connecticut v. Schweiker, 557 F. Supp. 1077, 1079 (D. Conn. 1983), reversed on other grounds, Connecticut v. Heckler, 731 F. 2d 1052, 1055 (2nd Cir. 1984)(district court has jurisdiction under APA), aff'd, Connecticut v. Heckler, 471 U.S. 524 (1985)(no mention of a jurisdictional defect); Colorado

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9/ County of Alameda expressly limited its holding to the circumstance in which the [federal] agency had already used "self-help setoff procedures" to collect the amount disallowed. 520 F. 2d at 349 n. 11.

Dept. of Social Services v. HHS, 558 F. Supp. 337, 347-48 (D. Colo. 1983), aff'd, 771 F. 2d 1422 (10th Cir. 1985); State of Georgia v. Califano, 446 F. Supp. 404 (N.D. Ga. 1977); Michigan v. Secretary of Health and Human Services, 563 F. Supp. 797 (W.D. Mich. 1983), aff'd, 744 F. 2d 32, 35 (6th Cir. 1984)(district court has jurisdiction to review disallowance claims); Oregon Department of Human Resources v. Dept. of Health and Human Services, 727 F. 2d 1411, 1414 (9th Cir. 1983)(following County of Alameda) (Secretary concedes jurisdiction).[10/]

10/ In Minnesota v. Heckler, 718 F. 2d 852, 857-860 (8th Cir. 1983), the Eighth Circuit ruled that while declaratory relief was available in the district court, and while the district court may review decisions of the Grant Appeals Board, it may not enter a judgment in damages or an injunction having the same effect. Thus the Eighth Circuit's decision resembles that of the court of appeals in this case.

Contrary to the assertion of the Secretary (Memor. of Cross-Resp. at 4), lower court decisions finding district court jurisdiction include cases where the Secretary raised or the court considered the Tucker Act as a possible bar to its jurisdiction. See, e.g., Maryland v. Department of Health and Human Services, 763 F. 2d 1441, 1445-51 (D.C. Cir. 1985)(disallowance under Title XX of the Social Security Act reviewable in district court; Tucker Act does not apply or otherwise preclude district court jurisdiction); Delaware Div. of Health v. U.S. Department of Health and Human Services, 665 F. Supp. 1104 (D. Del. 1987) (district court, not Claims Court, has jurisdiction over Medicaid disallowance); Virginia v. Bowen, No. 84-1171-R (W.D. Va. February 3, 1988)(same).

These decisions of the lower courts are supported by the legislative history of section 702. In 1976, Congress amended section 702 to waive the defense of sovereign immunity "in all equitable actions for specific relief" and eliminated the amount-in controversy requirement of 28 U.S.C. § 1331 for actions against the United States and federal officials. H.R. Rep. 94-1656, 94th Cong., 2d Sess. 9 (1976); Pub. L. No. 94-574, 90 Stat. 2721 (1976). The Senate report noted that in enacting earlier statutes such as the Tucker Act, Congress had already "made great strides toward establishing monetary liability on the part of the Government for wrongs committed against its citizens. . . ." S. Rep. No. 94-996, 94th Cong. 2d Sess. (1976) at 3 (emphasis added). Reform

was needed, however, for other kinds of cases challenging agency action. "These actions usually take the form of a suit for injunctive, declaratory or mandamus relief against a named federal officer on the theory he is exceeding his legal authority." S. Rep. 94-996 at 4.

The 1976 House and Senate reports specifically state that the APA amendments were intended to authorize judicial review in cases previously blocked by sovereign immunity, including cases involving the "administration of Federal grant-in-aid programs." H.R. Rep. No. 1656, 94th Cong., 2d Sess. 1, 9; S. Rep. No. 94-996 at 8.

These aspects of the legislative history of § 702 demonstrate that Congress intended district court review of cases such as grant-in-aid disallow-

ances. If cases involving the "administration of federal grant-in-aid programs" were already cognizable under the Tucker Act in 1976, there would have been no reason to identify those cases as an object of the 1976 APA amendments.[11/] Further, the 1976 elimination of the amount in controversy requirement in 28 U.S.C. § 1331 ensured that any actions for which immunity was waived by § 702 could proceed in

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11/ Contrary to the Secretary's assertion the cases cited in the House and Senate reports as the kind of cases which it was the purpose of the APA to permit ultimately sought disbursement of grant funds by alleging unlawful agency action. Dermott Special School District v. Gardner, 278 F. Supp. 687, 690 (E.D. Ark. 1968); Lee County Special School Dist. No. 1 v. Gardner, 263 F. Supp. 26, 30 (D. S.C. 1967). Furthermore, at the time of the 1976 amendments to the APA, Richardson v. Morris, 409 U.S. 464 (1973)(per curiam), had already held that a suit for equitable relief against the administration of a Social Security Act program was not cognizable under the Tucker Act.

the district court under federal question jurisdiction. See Davis, Administrative Law Treatise, § 23.-03-1 at 373 (Supp. 1982) (provision in APA Section 703 for review in "court of competent jurisdiction" means, in absence of contrary statute, review in district court). The legislative history of the repeal of the amount in controversy requirement identifies examples of cases otherwise cognizable in the district court which failed for lack of a sufficient amount in controversy. S. Rep. 94-996 at 12-13. Those cases included suits where plaintiff "claim[ed] that he was entitled to a federal grant or benefit such as federal employment or welfare. . . ." Id. at 13 (footnotes omitted). Thus, the legislative history

of the APA demonstrates that Congress intended that the district courts review disputes under federal grant programs such as Medicaid, notwithstanding that such review might result in disbursement from the federal treasury.

2. The Commonwealth's Case is for Judicial Review, Not "Money Damages."

The Secretary asserts that the Commonwealth's action is outside the APA's waiver of sovereign immunity because it is a suit for "money damages." Sec. Br. at 24-34. This argument is refuted by the nature of this case. See Point I, A, supra. The Secretary's claim is also refuted by the nature of the system of federal funding used in the Medicaid program and common to many federal grant programs. Before

turning to this second point, however, we note that the Secretary's definition of the term "money damages," which equates the term with the jurisdictional reach of the Tucker Act, would allow the Court to decide that the term "money damages" does not apply in this case if the Court decides that the case is not cognizable under the Tucker Act. The Secretary argues that "money damages" is a "shorthand phrase that this Court has often used -- interchangeably with other phrases describing monetary recoveries -- to describe the limitations, inferred from legislative context, on the jurisdiction conferred by the Tucker Act." (Br. at 18-19) (citations omitted). If this is so, and the Court accepts the argument that the Tucker Act does not encompass this case (Point II, A,

infra), then the term "money damages" used in § 702 cannot exclude the Commonwealth's case from that section's waiver of sovereign immunity. Alternatively, the Court should determine that the legislative history of the APA and the nature of the Medicaid program demonstrate that the Commonwealth's case is not one for "money damages."

The Secretary argues that the Congress which added the term "money damages" to the APA intended the term to apply to all actions "for monetary relief." Sec. Br. at 24-34.[12/]

12/ The Secretary relies extensively on excerpts from the hearings on the amendments to the APA, and law review articles which the Secretary claims provided the impetus for those amendments. Testimony at hearings and other submissions to Congress ordinarily provide limited guidance in discerning

(footnote continued)

According to the Secretary, an action seeking review of a Medicaid disallowance is an action for "monetary relief." However, even if the term "money damages" includes actions for "monetary relief," both terms only describe actions which in their essence seek money judgments.

The Commonwealth does not seek a money judgment or "monetary relief." It seeks judicial review and reversal of an unlawful agency decision. The Secretary apparently concedes that actions which

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(footnote continued)

legislative intent. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203-204 n. 24 (1976); Kelly v. Robinson, No. 85-1033 (November 12, 1986), slip. op. at 13-14 n. 13. Even articles and testimony cited by the legislative reports stand at least one step removed from the actual words of Congress, and where, as here, there is an interpretation of the statute that produces a more sensible result, such statements are easily outweighed.

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On Writs of Certiorari to
The United State Court of Appeals
For The First Circuit

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF THE COMMONWEALTH OF MASSACHUSETTS

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TABLE OF CONTENTS

	PAGE
STATEMENT AND INTEREST OF AMICUS CURIAE	1
ARGUMENT	5
A STATE WHICH SEEKS JUDICIAL REVIEW OF A DGAB DECISION IS NOT SEEKING "MONEY DAMAGES" FROM HHS	5
CONCLUSION	13

TABLE OF AUTHORITIES

PAGE

Cases

Bowen v. Gilliard
____ U.S. ____, 97 L.Ed 2d 485,
107 S.Ct. 3008, 55 L.W. 5079
(1987) 9

Heckler v. Turner
470 U.S. 184 (1985) 9

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STATEMENT AND INTEREST OF AMICUS CURIAE

The State of California, like all the other States, participates in the cooperative federal-state program, known as Medicaid, which provides health care

services to needy persons. The State of California, again like all the other states, participates in the cooperative federal-state program, known as Aid to Families with Dependent Children ("AFDC"), which provides cash assistance to needy families. California also participates in the Food Stamp Program, operated by the Department of Agriculture, and the numerous programs that assist in the education of our children, operated by the Department of Education.

All of these programs, in one way or the other, involve grants of monies to the States to pay a portion of the costs necessary to carry out the federally designed programs. All the programs require the States to comply with federal standards in the use of the monies. All the programs are subject to period "audits" by the cognizant federal agency to determine whether the state is in fact

operating in accordance with its "approved plan" and the requirements of federal laws and regulations. The "audits" also examine the appropriateness of the State's expenditures and claiming procedures. When the audit agency making the survey for the cognizant federal agency believes that the State has not operated its program or filed its claims as required by federal law, it may propose a "disallowance". Since the States operate on quarterly advances of federal funds based on estimated expenditures, a "disallowance" is really nothing more than a request to reduce a future quarterly advance by the amount of the proposed "disallowance".

In the case of the Medicaid and AFDC programs, the U.S. Department of Health and Human Services ("HHS") has delegated to its Departmental Grant Appeals Board ("DGAB") the power to take the final

agency action on any dispute between a State and the branch of HHS which has proposed a "disallowance".

These disputes between HHS and the States over the validity of a proposed "disallowance" are not unique, once-in-a-lifetime events, they occur all the time. California, for example, may have 5 or 6 cases pending before the DGAB on any one day.

Needless to say, DGAB decisions are not often favorable to the States. It is of vital importance, therefore, to the States where and how those adverse DGAB decisions are judicially reviewed.

California does not maintain an office of the Attorney General in the District of Columbia. (We doubt that many, if any, of the other States do.) To require the States to initiate and maintain what has become routine litigation in a courthouse literally

thousands of miles away is, to say the least, unfair. We recognize, of course, that convenience of the parties cannot be the tail that wags the judicial dog. But it is not something that can be completely ignored when construing a statute to determine congressional intent.

ARGUMENT

A STATE WHICH SEEKS JUDICIAL REVIEW OF A DGAB DECISION IS NOT SEEKING "MONEY DAMAGES" FROM HHS

The federal agency has proceeded on the premise that the States are seeking "money damages" from HHS when they seek judicial review of a DGAB decision. That premise is wrong. It is based on a complete mischaracterization of the nature of DGAB decisions.

By their very nature, DGAB decisions necessarily deal, at least technically, with a past period. For example, HCFA in 1985 may "audit" a State's Medicaid program for the years 1980-83 and propose

a "disallowance" based on a determination that the State was not following federal requirements during that period. In 1987, the DGAB may have issued a decision upholding the HCFA action. But when the State seeks judicial review of that DGAB decision, it is not seeking "money damages" for some wrongful act allegedly committed by HHS in 1980-83, 1985 or 1987. (In fact, since the States are not required to adjust a claim to reflect the "disallowance" until after the DGAB decision is issued, it is very likely that the State still has the funds when the complaint is filed.)

Rather, when a State seeks review of a DGAB decision, its primary purpose is to test the validity of the policy and program compliance rulings made by the cognizant HHS branch and upheld by the DGAB.

In some cases, the DGAB decision may have only a retroactive effect. This would be true when there has been a change in the law or operative facts between the audited years and the DGAB decision. But those are the exception, not the rule. These federal-state programs such as Medicaid and AFDC are on-going programs with relatively static rules. Thus the typical DGAB decision will have on-going application. For example, HCFA may propose a "disallowance" based on its conclusion that the State erroneously provides Medicaid benefits to a group of persons that HCFA believes are not eligible for services. The final audit report may make three "determinations":

1. The State should repay the amount identified in the audit for the audited years;

2. The State should audit subsequent

years and adjust subsequent claims accordingly; and

3. The State should change its practice in the future.

If the DGAB approves the "disallowance", the real issue on judicial review is not whether the State should collect "money damages" for some past period. The real issue is whether the State is properly running its Medicaid program.

These types of policy issues can reach the courts in any number of ways. If the State is implementing the federal policy, welfare recipients may bring an action against the State in district court seeking an injunction to enjoin the policy and, if the State has waived the Eleventh Amendment, for retroactive benefits as well. The federal agency may be joined as a party defendant or, if not, it may be brought into the action by the State defendant by way of a third-party

complaint. That this is proper is beyond dispute. See Bowen v. Gilliard (1987) ____ U.S. ____, 97 L.Ed. 2d 485, 497; 107 S.Ct. 3008, 3014; 55 L.W. 5079, 5081; Heckler v. Turner (1985) 470 U.S. 184, 187-8. No one would seriously suggest that these cases should have been litigated as claims for "money damages" under the Tucker Act. If, on the other hand, the State had refused to implement the federal policy, the same issue would arise in a "disallowance" argument before the DGAB.

We urge this Court not to hold that the way the question comes up converts a clearly non-Tucker Act case into a claim for "money damages". To do so would place form over substance without any indication from Congress that it intended such a non-realistic approach.

We agree with the federal agency to the extent that it argues that judicial

review of DGAB decisions should not be bifurcated in some metaphysical attempt to divide the decision into two cases, one dealing with money and the other dealing with "policy". In most cases these distinctions do not exist.

But the answer is not to send all DGAB judicial review cases to the Claims Court. That would most certainly be wrong. (For example, a State's suit asking review of a DGAB decision in which the State was alleging that the DGAB erred in excluding certain evidence at the hearing, would not be considered a suit for "money damages" under anyone's definition.)

To the contrary, the answer is to recognize that, even though DGAB decisions do have a monetary impact, review of those decisions does not constitute a claim for "money damages" against HHS. Thus, judicial review of DGAB decisions resides

in the district courts, which have traditionally dealt with the very type of issues which are the subject of DGAB decisions.

Nor are there any policy reasons to support the federal agency's position. The Secretary's claim that adjudication of these types of cases should be centralized in one court is not supportable. To the contrary, the type of issues raised in DGAB reviews are much like the issues traditionally decided by district courts in actions brought by welfare recipients to test the validity of federal or state policies. It makes no more sense to say that all DGAB reviews must be decided by a single forum that it would to say that all actions involving federal programs must be brought in one forum.

On the other hand, the burden on the States, particularly those like California that are located thousands of miles from

the District of Columbia, would be tremendous if all its welfare litigation involving HHS had to be conducted on the east coast. The programs are operated in California. The records are maintained in California. The "audits" are conducted in California by HHS personnel who reside in California. The attorneys for the State maintain their offices in California. Normally, the lawyers for HHS are local U.S. Attorneys and "house counsel" for HHS who maintain their offices in California. It just does not make sense to make a strained and overly narrow reading of the Administrative Procedure Act statutes just to shift all this routine litigation to one court on the east coast.

CONCLUSION

The position of HHS should not be adopted. This Court should hold that judicial review of DGAB decisions should remain where it traditionally has been, to wit, in the district courts for the state that is the subject of the DGAB decision.

DATED: March 29, 1988

Respectfully submitted,

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On Writs of Certiorari to The United States Court of Appeals For the First Circuit

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TABLE OF CONTENTS

INTEREST OF THE AMICI.....1

SUMMARY OF ARGUMENT.....4

I. The Tucker Act does not divest a....8
District Court from exercising jurisdiction over a state's third party complaint seeking federal financial participation for costs arising in an underlying action between beneficiaries and the state.

A. Course of Events in.....11
Grimesy v. McMahon v. Bowen

B. A third party complaint.....17
seeking to enjoin denial of federal financial participation for costs not yet incurred does not meet the elements of a Tucker Act claim.

C. A finding that the Tucker.....23
Act divests a district court of jurisdiction in Social Security Act third party complaint litigation would cause severe problems of judicial and program administration.

i. HHS' Position would.....25
result in multiple forums and duplicative litigation.

ii. HHS' Position would.....31
have the effect of
creating a national
trial court and a
National Court of
Appeals for Social
Security Act litiga-
tion.

II. An expansive construction of the....36
Tucker Act raises troublesome
implications in other areas of
law affecting federal program
beneficiaries.

A. Federal Housing Programs.....36

B. Other Federal Programs.....45

CONCLUSION.....48

TABLE OF AUTHORITIES

Cases — Page(s)

Amoco Prod. Co. v. Hodel,.....44
815 F.2d 352 (5th Cir. 1987),
cert. petition pending

Committee for Fairness, et al.,.....36
v. Pierce,
C.A. No. 87-0324 JHP (D.D.C.)

Commonwealth of Massachusetts v.....33
Departmental Grant Appeals Board,
815 F.2d 778 (1st Cir. 1987)

Conille v. Pierce,.....36
649 F. Supp. 1133 (D. Mass. 1986), aff'd, No. 87-1120 (1st Cir., Feb. 19, 1988)

Council of Large Public Housing.....37
Authorities v. HUD,
C.A. No. 82-1210 NHJ (D.D.C.)

Edelman v. Jordan,.....31
415 U.S. 651 (1974)

Frisby v. HUD,.....39
755 F.2d 1052 (3d Cir. 1982)

Grimesy v. McMahon v. Bowen,.....passim
Federal Circuit Court of Appeals Case No. 87-1228; Ninth Circuit Court of Appeals Case No. 87-1745

Jiminez v. Cohen,.....12
No. 85-5285 (E.D. Pa. July 14, 1986)

Johnson v. Secretary of HUD,.....44
710 F.2d 1130 (5th Cir. 1983)

Kali v. Heckler,.....12
800 F.2d 971 (9th Cir. 1986)

Laguna Hermosa Corp. v. Martin,.....21
643 F.2d 1376 (9th Cir. 1981)

Mann v. Pierce,.....36
803 F.2d 1552 (11th Cir. 1986)

Maryland Dept. of Human Resources v.....33
Dept. of Health and Human Services,
763 F.2d 1441 (D.C. Cir. 1985)

McCarthy v. Heintz,.....12
Civ. No. H-85-597 (MJB)
(D.Conn. Apr. 23, 1986)

Merrill Tenant Council v. HUD,.....44
638 F.2d 1086 (7th Cir. 1981)

Morrison v. Heckler,.....12
602 F.Supp. 1482 (D.Minn. 1984),
aff'd, 787 F.2d 1285 (8th Cir.
1986)

New Mexico v. Regan,.....44
745 F.2d 1318 (10th Cir. 1984),
cert. denied, 471 U.S. 1065
(1985)

Paris v. HUD,.....39
713 F.2d 1341 (7th Cir. 1983),
subsequent decision sub nom
Cowherd v. HUD, 827 F.2d 40
(7th Cir. 1987)

Portsmouth Redevelopment & Housing.....44
Authority v. Pierce,
706 F.2d 471 (4th Cir.), cert.
denied, 464 U.S. 960 (1983)

Rowe v. United States,.....21
633 F.2d 799 (9th Cir. 1980),
cert. denied, 451 U.S. 970 (1981)

Russell v. Landrieu,.....39
621 F.2d 1037 (9th. Cir. 1980)

State of Minnesota by Noot v. Heckler,..33
718 F.2d 852 (8th Cir. 1983)

Tenants for Justice v. Hill,.....39
413 F.Supp. 389 (E.D. Pa. 1975)

Thomas v. Pierce,.....supra
662 F. Supp. 519 (D. Kan. 1987),
appeal pending, Case No. 87-2121
(10th Cir.)

Topps v. Bowen,.....12
No. 85-NC-0187W (N.D. Utah, Jan.
13, 1986)

Trans-Bay Engineers and Builders,.....44
Inc. v. Hills,
551 F.2d 370 (D.C. Cir. 1976).

United States v. King,.....6, 20
395 U.S. 1, 3 (1968)

United States v. Mitchell,.....5, 17
463 U.S. 206 (1983)

United States v. Mottaz,.....6, 19
476 U.S. 834, 106 S.Ct. 2224
(1986)

United States v. Testan,.....18
424 U.S. 392 (1976)

Uram v. United States,.....29
216 Ct.Cl. 418 (1978)

Statutes

Housing and Community Development.....39
Amendments of 1978,
12 U.S.C. §1701z-11

Tax Reform Act of 1986, P.L. 99-514.....14

5 U.S.C. §702.....40
5 U.S.C. §706.....40
12 U.S.C. §1702.....40, 44
28 U.S.C. §1295(a)(2).....16
28 U.S.C. §1295(a)(3).....24
28 U.S.C. §1491.....41
42 U.S.C. §601 et seq.....11
42 U.S.C. §602(a)(39).....12, 14
42 U.S.C. §1404.....40, 44
42 U.S.C. §1404a.....40

Regulations

24 C.F.R. §290.25(b) (1978).....39
24 C.F.R. §290.27(b) (1978).....39

INTEREST OF THE AMICI

In the pending case, the Court is being asked to decide whether the Tucker Act prevents a district court from exercising jurisdiction over a state's action challenging a disallowance of funds in the Medicaid Program. The resolution of this issue will have profound importance for other Social Security Act litigation, and may affect access to the district courts and regional courts of appeals in many other areas of law.

Disallowance litigation is only one type of litigation affecting administration of the grant-in-aid programs under the Social Security Act. The other major type of litigation occurs when program beneficiaries sue a state for alleged violations of the Act. In such instances, the state often files a third party complaint against the federal government, alleging that if the state is liable to program beneficiaries, the federal government should be

obligated to provide federal financial participation in the state's costs. The disposition of Bowen v. Massachusetts may have a critical effect on such third party complaint litigation.

Amici include the plaintiffs in Grimesy v. McMahon v. Bowen, currently pending before the Federal Circuit Court of Appeals (Case No. 87-1228) and before the Ninth Circuit Court of Appeals (Case No. 87-1745). As more fully set forth below, the Grimesy litigation offers an example of the implications of HHS' Tucker Act jurisdictional arguments when applied to third party complaint litigation. HHS has argued in Grimesy that when a class of welfare recipients sues state officials for prospective relief and back benefits, and the state files a third party complaint against HHS, the third party complaint arises in part under the Tucker Act and may only be heard in the United States Claims Court. Relief for plaintiffs in Grimesy has been

stayed pending resolution of this jurisdictional issue.

Amici believe that the Grimesy litigation helps illustrate some of the problems that would result if HHS' Tucker Act jurisdictional argument were accepted in this case. Applying HHS' jurisdictional argument to third party complaint litigation would lead to duplicative litigation in multiple forums, and could cause chaotic dispositions of issues arising under the Social Security Act.

In addition to the Grimesy plaintiffs, amici include legal services organizations and public interest law offices who represent indigent clients in issues concerning federal grant-in-aid programs, federal housing programs, and other federally funded programs for the poor.

Amici have an interest in this case because the result may affect Social Security Act litigation whenever beneficiaries sue a state and the state initiates a

third party complaint against HHS. Amici believe the position being urged by HHS would result in countless procedural problems for Social Security Act and related litigation.

Amici also fear that the expansive view of the Tucker Act urged by HHS could adversely affect access to the federal courts in other areas affecting the poor. HHS' Tucker Act argument, if accepted, would shift much of the nation's litigation on the rights of beneficiaries and states in federal grant-in-aid programs to the United States Claims Court and the Federal Circuit Court of Appeals. This would create a morass of procedural and substantive problems. Amici wish to suggest some of the most troublesome ramifications of the position espoused by HHS.

SUMMARY OF ARGUMENT

The broad construction of the Tucker Act being urged by the United States raises serious problems in contexts other than

Medicaid disallowances.

The implications of the broad construction are illustrated by Social Security third part complaint litigation. This is litigation where beneficiaries sue a state for violation of the Social Security Act, and the state files a third party complaint against HHS. The third party complaint typically seeks to insure federal financial participation in the costs of any orders issued by the court in the underlying litigation.

In Grimesy v. McMahon, now pending before the Federal and Ninth Circuits, HHS contends that a state's third party complaint in such a case arises in part under the Tucker Act. This contention is inconsistent with established Tucker Act precedent. A Tucker Act claim based on a federal statute must seek a money judgment based on a statute that mandates compensation for damages sustained. United States v. Mitchell, 463 U.S. 206, 216-17

(1983). A state's third party complaint alleges no wrongful withholding of funds, and no wrongful conduct for which the state is entitled to "compensation" for "damages sustained." Moreover, a Tucker Act claim must be for "actual, presently due money damages", United States v. King, 395 U.S. 1, 3 (1968), based on the past acts of the federal government. United States v. Mottaz, 476 U.S. 834, 106 S.Ct. 2224, 2234 (1986). A state's third party complaint cannot allege an entitlement to any actual, presently due amount, and cannot allege entitlement based on any past acts of the United States.

If the Tucker Act were broadly construed to divest district courts of jurisdiction over state third party complaints in Social Security litigation, there would be two major undesirable consequences. First, such a result would ensure bifurcation of cases, since the Claims Court could not exercise jurisdiction over the case

between beneficiaries and the state. The bifurcation would create inefficiency, confusion, and potential chaos at both the trial and appellate stages.

Second, such a result would shift much Social Security Act litigation to the Claims Court and Federal Circuit Court of Appeals. Neither court has expertise in Social Security Act litigation. There is no evidence of Congressional intent to shift such cases to these courts. It would be difficult for low income beneficiaries to regularly litigate in Washington. It would be inappropriate to shift the frequently controversial litigation brought by indigent claimants to a trial court lacking the protections of the Article III judiciary. If the Federal Circuit were made a de facto national court of appeals for Social Security Act litigation, there would be increased burdens on both that and this court.

Finally, the government has recently

made an even more expansive Tucker Act jurisdictional argument in the context of federal housing programs. The United States has suggested that an action for declaratory and injunctive relief arises under the Tucker Act when it has financial consequences, even when the plaintiffs do not seek money. Thomas v. Pierce, 662 F. Supp. 519 (D. Kan. 1987) appeal pending, No. 87-2121 (10th Cir. 1988). This argument, if accepted, could convert virtually any case in which program beneficiaries allege illegal conduct by the United States into a Tucker Act action. The Court should reject this major alteration of jurisdiction in the federal courts.

I. The Tucker Act does not divest a District Court from exercising jurisdiction over a state's third party complaint seeking federal financial participation for costs arising in an underlying action between beneficiaries and the state.

Apart from disallowance cases, there

is another major area of litigation concerning grant-in-aid programs under the Social Security Act. This other category arises when program beneficiaries sue a state for alleged violation of the Social Security Act. In such cases, the states often file a third party complaint against HHS, alleging that has been following the directives of HHS, and that if the state practice violates federal law, so do HHS' directives. Typically, the state seeks injunctive relief to prohibit HHS from sanctioning the state for compliance with court orders, and to require HHS to provide federal financial participation in the cost of compliance with the court's order.

Amici believe this category of cases is distinguishable from disallowance litigation. Even if this Court holds that the Claims Court has exclusive jurisdiction over disallowance cases, the Court could still make clear that state claims in third party complaint litigation do not arise

under the Tucker Act. Alternatively, the Court could reserve the issue for another day. However, amici fear that an expansive construction of the Tucker Act here could encourage lower courts to find the Tucker Act precludes district court jurisdiction over third party complaints in these cases.

However the Court decides this case, there are considerations in both Tucker Act jurisprudence and in the practical realities governing Social Security Act litigation that should lead to a holding that district court jurisdiction in these third party complaint cases is not limited by the Tucker Act.

In the following section, amici will describe the facts of Grimesy v. McMahon v. Bowen, an example of such third party complaint litigation. They will then explain both why this category is distinguishable from disallowance litigation, and why an expansive construction of the Tucker Act in the disallowance context could cause

severe damage in third party complaint litigation. The difficulties posed by applying an expansive view of Tucker Act jurisdiction in third party complaint litigation help to demonstrate some of the disturbing implications of HHS' arguments in this case.

A. Course of Events in Grimesy v. McMahon v. Bowen

The Grimesy litigation[1] began when AFDC Program beneficiaries sued California officials for injunctive relief and back benefits based on an illegal program practice.[2] J.A. at 23. Plaintiffs filed

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[1] The following description is based on the pleadings and orders, as they appear in the Joint Appendix ("J.A.") on file in Federal Circuit No. 87-1228.

[2] AFDC is a cooperative federal state program of assistance to families with needy children, pursuant to Title IV-A of the Social Security Act, 42 U.S.C. §601 et seq.

The legal issue in Grimesy concerned counting of income in AFDC. California, when determining AFDC eligibility and benefits for families in which the parent was between the age of 18 and 19, "deemed

(continued...)

suit in state court. The state removed the case to the United States District Court for the Northern District of California. J.A. at 18. Since the state engaged in its practice at the direction of the Secretary of Health and Human Services (HHS), the state filed a third party complaint against HHS. J.A. at 85-87. The third party complaint alleged that AFDC is a cooperative federal-state program and that the state is entitled to receive federal

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[2](...continued)
available" the income of the parents of the 18 year old parent, regardless of whether the parent was still in school. Plaintiffs contended that deeming of grandparent income when an eighteen year old parent was not in school or not expected to graduate by age nineteen violated both the Social Security Act, 42 U.S.C. §602(a)(39), and state law. The district court, and every court that addressed the issue concluded that the challenged practice violated federal law. See J.A. at 90-94; Kali v. Heckler, 800 F.2d 971 (9th Cir. 1986); Morrison v. Heckler, 602 F.Supp. 1482 (D.Minn. 1984), aff'd, 787 F.2d 1285 (8th Cir. 1986); Jiminez v. Cohen, No. 85-5285 (E.D. Pa. July 14, 1986); McCarthy v. Heintz, Civ. No. H-85-597 (MJB) (D. Conn. Apr. 23, 1986); Topps v. Bowen, No. 85-NC-0187W (N.D. Utah, Jan. 13, 1986).

financial participation (FFP) for expenditures made pursuant to an approved state plan. The state sought an order providing that if it were liable to plaintiffs, HHS be required to provide FFP for the AFDC program expenses incurred as a result of compliance with the court's order. J.A. at 87. HHS did not object to the district court's jurisdiction.

On June 25, 1986, the district court issued an order holding both the state's practice and the federal regulation on which the state practice was based violated the Social Security Act and were invalid. J.A. at 90-94. The court enjoined the state practice, and enjoined HHS from taking any action whatsoever against the state by way of compliance proceedings, audit disallowance or otherwise because of the state's compliance with the order. J.A. at 93. Both the state and HHS appealed to the United States Court of Appeals for the Ninth Circuit. (Ninth Cir.

Cases No. 86-2403, 86-2559). Each defendant subsequently dismissed their appeal, after the enactment of legislation which barred the practice plaintiffs challenged in the litigation.[3]

On July 23, 1986, the district court issued a subsequent order holding class members were entitled to corrective payments for the benefits lost while the state's unlawful practice was in effect. J.A. at 95-96.

On December 22, 1986, the district court entered an order implementing a procedure for provision of the corrective benefits. J.A. at 1-8. The order included a paragraph enjoining HHS from sanctioning the state for its compliance with the order or denying federal financial participation for the administrative and program costs

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[3] On October 22, 1986, Congress enacted the Tax Reform Act of 1986, P.L. 99-514. The Tax Reform Act amended 42 U.S.C. §602(a)(39) to prohibit any deeming of grandparents' income when an eighteen year old parent seeks AFDC benefits.

incurred in complying with the order. J.A. at 8. The court also issued an order denying HHS' motion to reconsider its orders of June 25 and July 23. J.A. at 9-15.

HHS then filed notices of appeal in both the Federal and Ninth Circuits. It alleged that the part of the state's third party complaint seeking federal financial participation in the cost of retroactive benefits arose under the Tucker Act, and that therefore the state's claim should have been filed in the United States Claims Court. See Fed. Cir. Case No. 87-1228, HHS Substitute Br., at 1-2. HHS contends that the Federal Circuit has exclusive jurisdiction over the question, and that its Ninth Circuit appeal is only protective in nature. HHS Substitute Br., at i. The jurisdictional issues are currently pending before both courts.

To date, HHS has limited its argument to contending that the state's third party

complaint should have been heard in the Claims Court, and appealed to the Federal Circuit. However, HHS has not precluded the possibility of arguing that when a state's third party complaint arises in part under the Tucker Act, the Federal Circuit should exercise exclusive jurisdiction over the entire underlying litigation.[4]

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[4] HHS' Federal Circuit Brief in Grimesy contains this suggestive text:

"This Court has also held that exclusive appellate jurisdiction in the Federal Circuit lies over appeals including non-Tucker Act issues that would have been decided by the regional courts of appeals had they not appeared in the same case as a Tucker Act claim. It is beyond cavil that the plaintiffs' petition for relief from California, as contrasted with the California's third party complaint against the federal government, cannot be construed as coming within the scope of the Tucker Act. Nevertheless, this Court has stated that where the jurisdiction of the district court "was based, in whole or in part" (28 U.S.C. 1295(a)(2)) on a non-tax Tucker Act claim, the entire appeal is within the exclusive jurisdiction of the Federal Circuit, no matter what other claims have been joined with the Tucker Act claim in the complaint. Perhaps, although this Court need not consider that question today, this principle would extend so far

(continued...)

Disposition of Grimesy in the Federal Circuit has been stayed pending resolution of this case; HHS' corresponding request to the Ninth Circuit is pending. See Fed.Cir. Case No. 87-1228, Order, January 19, 1988.

B. A third party complaint seeking to enjoin denial of federal financial participation for costs not yet incurred does not meet the elements of a Tucker Act claim.

Whether or not a disallowance case arises under the Tucker Act, a third party complaint seeking to require the federal government to share in the costs of compliance with a court order is not a claim arising under the Tucker Act.

In United States v. Mitchell, 463 U.S. 206 (1983), this Court restated the test

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[4](...continued)
as to bring within the jurisdiction of this Court non-Tucker Act claims raised by other parties in a multiple party cases, such as this one."

HHS Substitute Br., at 30, n.10 (citations omitted).

for determining whether claims founded on a federal statute are subject to Tucker Act jurisdiction:

> The claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'

463 U.S. at 216-17, quoting United States v. Testan, 424 U.S. 392, 400 (1976) (citations omitted).

A third party complaint seeking to require HHS to share in the cost of compliance with any court orders issued in an underlying action does not meet the Mitchell test. A complaint in such a case does not seek "compensation" and does not allege any right to "damages." It does not allege wrongful withholding of funds, or any wrongful conduct, by HHS. It is a contingent request that if the state is

held liable, the court order HHS to provide federal participation for all AFDC program expenses incurred as a result of compliance with the court's order.

In substance, such a complaint seeks declaratory relief. The state alleges no present injury, since there has been no determination of state liability, and no statement that HHS would refuse to provide federal participation for those costs. The state simply seeks a declaration of rights against HHS in case of state liability. The state does not seek "damages" within any ordinary meaning of the word.

Moreover, "damages for the [federal] Government's past acts" is "the essence of a Tucker Act claim for monetary relief." United States v. Mottaz, 476 U.S. 834, 106 S.Ct. 2224, 2234 (1986) (emphasis added). In the third party complaint, the state does not sue HHS for losses previously incurred by the state. The claim is made before any determination that the state is

seek judicial review and orders as to future Medicaid services are not ones for "money damages," regardless of whether the reviewing court determines the Secretary's future obligation to pay. Sec. Br. 15 n. 11. If that is so, it is also clear that an action for review of an agency decision is not an action for a money judgment or money damages, since it simply determines the correctness of the agency's substantive legal decision, and not the Secretary's monetary liability. Yet the Secretary contends that if reimbursement for past audit periods is involved in a case, that fact transforms the case into a suit for money damages.[13/]

13/ In a similar context, this Court rejected a characterization of reimbursement under the Education for All Handicapped Children Act as "damages." School Committee of the Town of

(footnote continued)

The legislative history of the APA amendments supports the conclusion that Congress did not intend to include actions such as this within the term "money damages." The term "money damages" was added to the APA in the 1976 amendments. The legislative history of the term demonstrates an intent to equate the term with well-known claims for damages which arose in contract and tort actions. See 121 Cong. Rec. 29, 995 (1975)(remarks of Sen. Bumpers); Sovereign Immunity: Hearing on S. 3568, before the Sub Comm. on

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(footnote continued)

Burlington v. Department of Education, 471 U.S. 359, 370-371 (1985). "Reimbursement . . . merely requires "payment of "expenses" that "should have been paid all along." Id. The remedy of reimbursement sought in Burlington was determined by this Court not to be "damages" but a "post hoc determination of financial responsibility." Id. The same characterization applies here.

Administrative Practice and Procedure of the Senate Judic. Comm., 91st. Cong., 2d Sess. (1970) at 18. Indeed, the references to the Tucker Act which appear in the House and Senate Reports on the APA amendments are exclusively concerned with contract claims. H.R. Rep. No. 94-1656 at 5, 12; S. Rep. No. 94-996 at 4, 12.

In labeling the Commonwealth's case as a suit for money damages, the Secretary ultimately would make jurisdiction turn upon the fact that he has already acted to recoup the disputed amounts from subsequent reimbursement. Under the current system of advance funding and retroactive audit and disallowance, the Secretary recoups disallowed funds from future payments. See 42 U.S.C. §§ 1396b(d). Thus the Secretary need not commence an enforcement action to

recover disallowed funds. Compare Bennett v. Kentucky Department of Education, 470 U.S. at 658 (enforcement action). In the absence of preliminary injunctive relief, the Secretary's power to recoup monies from future advances invariably means that a state must pursue litigation after re- coupment takes place. Thus the court of appeals noted that the "structure of the Medicaid program . . . makes it inevitable that disallowance decisions concern money past due." Pet. App. 4a. It is this posture (as a plaintiff pursuing a suit after recoupment) which exposes a State to simplistic characterizations of its case as a suit for "money past-due" and "money damages."

The Secretary relies upon his recoupment of funds from future payments to support his novel argument on

jurisdiction, yet the Secretary concedes that the district court would have jurisdiction over an action which sought review of his decision but granted only "prospective" relief. Sec. Br. at 15 n. 1. If this is so, then jurisdiction would turn upon the outcome of each State's request for preliminary relief, because if such relief were obtained, no request for money "past-due" would be present. There is no evidence whatsoever that Congress intended such an uncertain basis for jurisdiction.

The court below determined that the term "money damages" in § 702 should be read "to mean any monetary relief, whether it is in the nature of damages or in the nature of specific relief." Commonwealth of Mass. v. Departmental Grant Appeals Board, 815 F.2d at 783;

see Pet. App. 5a-6a. That conclusion is not consistent with the evidence that Congress intended to authorize grant program litigation in the district court, but it is also beside the present point which is that the district court could (and did) grant complete relief by reversing the agency's decision and remanding the matter.[14/]

14/ Maryland Department of Human Resources v. HHS, 763 F. 2d 1441, 1446 (D.C. Cir. 1985), reached the result we seek here by distinguishing an action for "money damages" from one for "specific relief." The Secretary's brief assumes the considerable burden of examining and undermining the Maryland distinction. As demonstrated above, however, this case seeks neither "money damages" nor "monetary relief," and the district court satisfactorily resolved the dispute by reversing the Board's decision. Therefore, the Court need not adopt the reasoning of Maryland to reject the Secretary's characterization that this action is a suit for "money damages."

In sum, this is not a case for "money damages" beyond the jurisdiction of the district courts.

3. The Tucker Act Does Not Create an "Adequate Remedy" in the Claims Court that Bars District Court Review.

The waiver of sovereign immunity contained in section 702 includes "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court. . . ." 5 U.S.C. § 704. The Secretary argues that a disallowance is unreviewable in the district court because the Tucker Act provides an "adequate remedy" in the Claims Court. Sec. Br. at 43-44. The Secretary assumes, for the sake of his argument, that the Commonwealth's action is not one

for "money damages." Sec. Br. at 11. But if the Commonwealth's action is not one for "money damages," it follows (as we argue in Point II, below) that an action for judicial revew of a disallowance is not within the jurisdiction of the Claims Court under the Tucker Act. If this is so, then the Secretary's argument that an action under the Tucker Act is "adequate" fails a fortiori. However, even if Congress conferred jurisdiction on the Claims Court over such "non-monetary" claims, we argue below that jurisdiction does not preclude district court jurisdiction under the APA because, by the Secretary's own admission, the remedies

in the Claims Court are not "adequate."15/

The relevant provision in section 704 was primarily "intended . . . to codify the existing law concerning ripeness and exhaustion of remedies," (Mass. v. Dept. Grant Appeals Board, 815 F.2d 778, 784 (1st Cir. 1987)), by ensuring that pre-enforcement review would not be available if "subsequent review in enforcement proceedings is 'adequate.'" Administrative Procedure Act: Legislative History, S. Doc. 248, 79th Cong. 2d Sess. 38 (1946). Thus the Secretary is reading a limitation in the waiver in section 702 where none exists,

15/ Indeed, in conceding that the Commonwealth could litigate in the district court if it waived the federal share of past expenditures, the Secretary acknowledges that an award of money is not an adequate remedy in an ongoing grant program.

or was intended. At the least, he is urging on the Court an overly broad reading of the purported limitation.

Even if section 704 imposes the limitation urged by the Secretary, it would not apply in this case, because the remedy in the Claims Court is not "adequate." The Tucker Act remedy in the Claims Court is inadequate because the Claims Court has no authority to provide the injunctive and declaratory relief available in the district court and often necessary to complete relief in a disallowance case.16/ "The

16/ The Claims Court is an Article I court, created by the Federal Courts Improvement Act (FCIA) of 1982, Pub. L. No. 97-164, 96 Stat. 25. The jurisdiction of the Claims Court includes the trial jurisdiction of the "United States Court of Claims," which was abolished by the FCIA. The decisions of the Claims Court are appealable under 28 U.S.C. § 1295(a)(3), to the United States Court of Appeals of the Federal Circuit.

Claims Court or district court exercising Tucker Act jurisdiction ordinarily lacks the authority to grant specific performance of contracts as well as other forms of equitable relief." Spectrum Leasing Corp. v. United States, 764 F.2d at 895 n. 7 (citation omitted). Only "in limited circumstances the Claims Court when exercising Tucker Act jurisdiction may be empowered to grant such equitable relief where the relief sought is in the form of money." Id. at 895 n. 7. In fact, prior to 1972, the Claims Court's predecessor (the Court of Claims) had no power to enter any equitable relief. See, e.g., United States v. King, 395 U.S. 1 (1969); Richardson v. Morris, 409 U.S. 464 (1973)(per curiam). In 1972, the Tucker Act was amended to grant the

Court of Claims "the power to remand appropriate matters to any administrative or executive body or official with such directions as it may deem proper and just." Pub. L. No. 92-415, 86 Stat. 652 (1972) (amending 28 U.S.C. § 1491). The legislative history of this "remand provision" demonstrates that Congress intended that the remand power conferred on the Court of Claims was more limited than the equitable jurisdiction of the district courts.[17/] In fact, Congress limited the equitable power given the Court of Claims after the Department of Justice expressed its concern about

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17/ See S. 1704, 90th Cong., 2d Sess. (1968); S. Rep. 1465, 90th Cong., 2d Sess. 4 (1968); S. Rep. 92-1066, 92d Cong., 2d Sess. 2 (1972); H.R. 12392, 92d Cong., 2d Sess. (1972); H.R. Rep. 92-1023, 92d Cong., 2d Sess. 5 (1972).

giving that court authority "over a wide range of governmental activities" or authorizing persons to "claim all sorts of relief against any agency of the Government."[18/] The legislative history further shows that Congress intended the remand power to be exercised only in government contract disputes. See S. Rep. 92-1066 at 3; H.R. Rep. 92-1023 at 4.

Following the enactment of the "remand provision," this Court and the Court of Claims consistently held that the Tucker Act did not authorize permanent or preliminary injunctive relief, declaratory judgments, or writs of mandamus. E.g., Lee v. Thornton, 420

18/ Collateral Relief in the Court of Claims: Hearing on H.R. 12392 Before Subcomm. No. 2 of the House Comm. on the Judiciary, 92d Cong., 2d Sess. 114, 121, 123, 134, 127 (1972).

U.S. 139 (1975) (per curiam); Smith v. United States, 654 F.2d 50, 53 (Ct. Cl. 1981).[19/]

The limited remedies available in the Claims Court are particularly inadequate in grant-in-aid disputes. The Secretary concedes that "the remedial powers of the Claims Court . . . will be limited to the power to render a money judgment and the limited power of remand to the agency that is given by 28 U.S.C. § 1491(a)(2)[,]" and that the "court will not have the power to issue a declaratory judgment that the GAB has misconstrued the law, or to enjoin peti-

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19/ In the Federal Courts Improvement Act of 1982 (the "FCIA"), Congress for the first time gave the Claims Court authority to enter declaratory judgments, injunctions, and other equitable relief in certain contract cases. See Pub. L. No. 97-164, § 133, 96 Stat. 25, 40 (1982) (codified at 28 U.S.C. § 1491(a)(3)).

tioners henceforth to construe the law differently when dealing with respondent." Sec. Br. at 45 (footnote omitted). Since the Claims Court cannot enter declaratory or injunctive relief (Sec. Br. at 45), the States could be required to commence suit in the Claims Court for each disputed period. The Claims Court would also be barred from issuing preliminary injunctions to prevent irreparable harm to individual beneficiaries or to States concerned about the elimination of disputed services.[20/]

20/ The Secretary suggests that since such cases are "simply a dispute about a stream of money payments over time," the Claims Court can provide complete relief and provide a "statement of the law that will bind the federal government in future dealings with the plaintiff." Sec. Br. at 44. The Claims Court cannot however, provide "complete" relief. Furthermore, the Secretary's statement grossly minimizes the important services at stake and ignores the limited resources of beneficiaries and States to repeatedly litigate in the Claims Court.

In sum, the language and legislative history of the APA and the Tucker Act demonstrate that the remedies available in the Claims Court are not "adequate" remedies which would bar district court review of grant disallowances under the APA.

C. The Social Security Act and the Federal Courts Improvement Act Support District Court Review of Grant Disallowances.

The jurisdiction of the district court over this case also is supported by considering the "entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." Feres v. United States, 340 U.S. 135, 139, (1950).

The Secretary does not address the overall statutory context of this case. His narrow focus fails to take into account related legislative enactments and their histories, and ignores the anomalous consequences of his position. The Social Security Act (SSA) and Federal Courts Improvement Act of 1982 (FCIA) demonstrate long-term and prevailing Congressional intent to (1) vest power to review agency action under Title XIX and other titles of the Social Security Act in the district courts and the regional courts of appeals, and (2) limit the creation and jurisdiction of "specialized" courts, particularly those created by the FCIA.

1. The Social Security Act is one of the most complex statutes Congress has ever enacted. See Schweiker v. Gray

Panthers, 453 U.S. 34, 43 (1981). Pursuant to the Act, federal agencies have promulgated extensive regulations which set forth detailed policies and requirements for the programs covered by the Act.

The Social Security Act has a breadth of social impact that is equal to the depth of its terms. The Medicaid program is the largest of several cooperative federal-state programs operated under the authority of the Social Security Act to provide medical, financial, and other assistance to needy citizens. Programs under the Act include: Medicaid (Title XIX), social services (Title XX), and aid to families with dependent children (AFDC)(Title IV). Non-grant programs created by the Act include Social Security and Medicare.

The district courts and regional courts of appeals have substantial expe-rience deciding cases involving grant-in-aid programs under by the Social Security Act. This judicial experience has developed because Congress has often explicitly provided for judicial review of agency action under the Social Security Act in those courts. E.g., 42 U.S.C. § 405(g)(Social Security disability cases reviewable in district court); 42 U.S.C. § 1395oo(f) (district court review of certain actions brought by Medicare providers).

In the Medicaid Act itself, Congress has specifically authorized review in the court of appeals for "compliance" questions closely related (and sometimes nearly identical) to those raised in Medicaid disallowance disputes. Under 42 U.S.C. § 1396c, the Secretary may

review state plans, and amendments thereto, to determine whether they comply with the Medicaid Act. The "state plans" submitted to the Secretary under the Medicaid program contain lengthy and detailed descriptions of services provided under that program. If the Secretary rules that a plan does not comply with the Act, he may terminate federal Medicaid grants in whole or in part. Id. The Secretary's decision on a "compliance" matter is subject to judicial review in the court of appeals in which the State is located. 42 U.S.C. § 1316(a)(3); State of Ohio v. Dept. of HHS, 761 F. 2d 1187 (6th Cir. 1985).[21/] Past litigation in the

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21/ Under the Secretary's regulations, amendments to a state plan are subject to his approval, but effective on the date indicated by the state. 45 C.F.R.

(footnote continued)

courts of appeal demonstrate that a question of law or policy can often form the basis for either a disallowance or compliance dispute. E.g., Massachusetts v. Grant Appeals Board, 698 F. 2d 22 (1st. Cir. 1983). The court of appeals noted in this case that disallowances are used by the Secretary "to implement important policies governing ongoing programs." Pet. App. 4a. Given the fact that Congress expressly authorized court of appeals review for such closely related questions arising under the Medicaid Act, it is inconceivable that

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(footnote continued)

§ 210.3(g)(1987). The regulations also provide for administrative and judicial review (in the court of appeals) of a disapproval of plan amendments. Id. at §§ 203.4 and 203.7. Most importantly, the regulations further provide that upon the reversal of a prior disapproval, the Secretary will "certify restitution forthwith in a lump sum of any funds incorrectly witheld on otherwise denied." Id. at 201.4.

Congress intended that challenges to disallowances would be relegated to the Claims Court.[22/]

22/ The result sought by the Secretary would also be anomalous because it would remove from the district courts important issues of federal-state relations presented by grant-in-aid disputes. As a general proposition, this Court has required Congress to seasonably and unambiguously express federal conditions on the States' receipt of grants under the Medicaid and other programs. Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 25 (1978); see Bell v. New Jersey, 461 U.S. 773, 794 (1983)(White, J., concurring). Each time that the Secretary asserts his power to retrospectively interpret the Medicaid Act and to refuse to supply the federal share of reimbursement for past and future services, he imposes conditions which were not clear when the State's plan was approved or when it expended funds to purchase services for needy persons. The Secretary's view of jurisdiction thus imputes to Congress an intent to deprive the States of an Article III forum for the resolution of legal issues which effect millions of beneficiaries and implicate important issues of federalism.

Thus the result sought by the Secretary in this case conflicts with the terms and purposes of related portions of the Social Security Act and the Secretary's regulations. The Commonwealth's reading of the APA and the Tucker Act should be adopted by the Court because it is more consistent with the Act and avoids severe jurisdictional anomalies that Congress did not intend.

2. The jurisdiction of the district court over this case is also supported by the terms and legislative history of the Federal Courts Improvement Act of 1982 (FCIA), which created the Claims Court and defined the scope of its authority. In his brief the Secretary repeatedly asserts that Congress granted the Claims Court exclusive jurisdiction over the Commonwealth's case. It is

remarkable, then, that the Secretary nowhere discusses the legislative history of the FCIA, the act which he admits "created" the Claims Court as it currently exists. Sec. Br. at 14 n. 9.

The FCIA created the United States Claims Court and the United States Court of Appeals for the Federal Circuit. P.L. No. 97-164, 96 Stat. 25 (1982). The enactment of the FCIA followed a long and spirited debate over the reorganization of the federal courts and the creation of specialized courts.[23/]

23/ See H.R. Rep. 97-312, 97th Cong., 1st Sess. (1981); S. Rep. 97-275, 97th Cong., 1st Sess. (1981) at 1-8; Federal Courts Improvement Act of 1981: Hearings on S. 21 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. (1981).

The legislative debate and the committee reports reflect long-term and prevailing Congressional reluctance to create specialized courts to hear cases which have a wide impact on social policies. See, e.g., S. Rep. 97-275 at 39-41 (additional views of Senators Leahy and Baucus). If Congress believed in 1982 that the Court of Claims already had jurisdiction to review scores of types of agency decisions, including those made in grant-in-aid programs under the Social Security Act, the debate as to specialized courts would have been pointless. But in fact, Congress carefully limited the jurisdiction of the Claims Court and Federal Court, and refused to enact bills that would have expanded the jurisdiction of those courts or created specialized courts to hear cases involving the environment,

immigration, civil rights, aviation, and other "cases involving the interaction of laws and people." S. Rep. 97-275 at 39 (additional views of Senator Leahy).

The history of a predecessor bill to the FCIA confirms that through the creation of the Federal Circuit Congress intended to create "an appellate forum capable of exercising nationwide jurisdiction over appeals in areas of the law where Congress determines there is a special need for nationwide uniformity[.]" S. Rep. 96-304 at 8 (proposed Federal Courts Improvement Act of 1979).[24/] The legislative history

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24/ "Among other things, the [FCIA] grants the Federal Circuit exclusive appellate jurisdiction over a variety of cases involving the Federal Government. 28 U.S.C. § 1295(a)(2)." United States v. Hohri, No. 86-510 (June 1, 1987),

(footnote continued)

of the FCIA nowhere mentions any case similar to this which Congress intended to remove from the then-existing caseload of the district and regional courts of appeal and transfer to the Claims Court and the Federal Circuit. This legislative silence in the FCIA is telling because at the time of the enactment of the FCIA, the federal courts had already held that the district courts had the authority to review disallowance decisions in grant-in-aid cases. See cases collected in Point I, B, supra. In construing statutes,

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(footnote continued)

slip. op. at 3. The 1981 Senate Report states that the Federal Circuit would "handle all patent appeals, plus government claims case[s] and all other appellate matters that are now considered by the [Court of Customs and Patent Appeals] or the Court of Claims[.]" S. Rep. 97-275 at 6.

the Court assumes that the Congress which enacted the law in question was aware of previous judicial decisions construing then-existing statutes. See, e.g., Director, Office of Workers' Compensation v. Perin North River Associates •459 U.S. 297, 319-320 (1983). Moreover, Congressional intent as to judicial review may be "inferred from contemporaneous judicial construction . . . and the congressional acquiescence in it[.]" Block v. Community Nutrition Institute, 467 U.S. at 349, citing Ludecke v. Watkins, 335 U.S. 160 (1948). There is no indication in the legislative history of the FCIA that Congress wished to disturb the decisions which had already found district court jurisdiction over grant disputes.

To the contrary, it is reasonable to infer that Congress foresaw at least two serious effects of such a transfer of jurisdiction. First, Congress knew that programs under the Social Security Act primarily affect needy people who would most benefit from the convenience of litigating questions under the Act in their local federal courts. United States v. Hohri, supra, notes that district court jurisdiction grants the "right to bring suits in the districts where [plaintiffs] reside without subjecting them to the expense and annoyance of litigating in Washington." Id., slip op. at 1-2 n. 1. Congress was aware of the burden which would be imposed on the States and recipients of Medicaid and other benefits who would be forced to litigate in Washington. Yet

if the Secretary's position is adopted, virtually all disallowance disputes in federal grant-in-aid programs, as well as other actions arising under the SSA, will be channeled to Washington for litigation in the Claims Court and the Federal Circuit.[25/] There is no legislative evidence that Congress intended such a result.

Second, Congress was aware that the substantive issues presented by grant cases arising under the Social Security Act and similar statutes are far from routine questions of law. See Pet. App. 8a; Schweiker v. Gray Panthers, supra. In fact, by 1982, the district courts

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25/ In fact, the Secretary has already taken the position that the Claims Court has exclusive jurisdiction over a suit by recipients against a state in which the state files a third-party complaint against the Secretary. See Grimesy v. McMahon, No. 87-1228 (pending in the Federal Circuit).

and regional courts of appeals had developed substantial experience in these areas.[26/] In the absence of a clear indication in the FCIA that Congress intended to extinguish the jurisdiction of these courts, and to confer it on the two newly-created, specialized courts, the Court should reject the Secretary's latest construction of the APA and the Tucker Act.

26/ Indeed, the resolution of the merits of this case required reference to both the Social Security Act and the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq. (EHCA). At the time of enactment of the FCIA, the district courts and the courts of appeal had acquired substantial experience with EHCA. See Burlington School Committee, supra; Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176 (1982).

II. THE TUCKER ACT DOES NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION OF THIS CASE.

A. The Tucker Act Does Not Confer Jurisdiction On The Claims Court Over This Case.

The Secretary argues that if any aspect of the Commonwealth's case is within the jurisdiction of the Claims Court under the Tucker Act, then the district court lacks jurisdiction over the entire action, and the court of appeals erred in concluding that such a case could be "bifurcated." Sec. Br. at 36-46. However, this argument assumes that this case may be brought under the Tucker Act. The Secretary himself acknowledges that the issue of "claim-splitting" only arises if the case "includes a Tucker

Act claim. . . ." Sec. Br. at 11. If the Commonwealth's case is not within the Tucker Act, then the Tucker Act does not preclude the Commonwealth from relying upon § 702's waiver of sovereign immunity, and invoking the federal question jurisdiction of the district courts under 28 U.S.C. § 1331. See Maryland v. Dept. of HHS, 763 F. 2d at 1448, 1450 n. 5.

The Tucker Act provides in relevant part:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases sounding in tort.

28 U.S.C. § 1491. This section waives the sovereign immunity of the federal government and defines the jurisdictional limits of the Claims Court relevant to this case. The Tucker Act, does not, however, "create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 398 (1976). Thus a plaintiff invoking the jurisdiction of the Claims Court under the Tucker Act must assert a substantive right that derives from another source of law. Id. A "claim" cognizable under the Tucker Act "must be one for money damages against the United States . . . and the claimant must demonstrate that the source of substantive law he relies on can fairly be interpreted as mandating compensation

by the Federal Government for the damage sustained." United States v. Mitchell, 463 U.S. 206, 216-217 (1983), citing United States v. King, 395 U.S. 1, 2-3 (1969), and United States v. Testan, 424 U.S. at 400.[27/]

The Secretary argues that the Medicaid Act "can fairly be interpreted (if respondent is right on the merits) as mandating compensation by the federal government for the 'damage' sustained (i.e., payment of the amount of reimbursement incorrectly witheld)." Sec. Br. at 17. This broad reading ignores the rule that in "determining

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27/ See Murray v. U.S., 817 F. 2d 1580, 1582-1583 (Fed. Cir. 1987); Hambsch v. United States, 12 Cl. Ct. 744, 749 (1987), citing Eastport S.S. Corp. v. United States, 372 F. 2d 1002, 1009 (Ct. Cl. 1967)(Claims Court cannot grant any relief absent a "mandate" for an "award of money damages").

the general scope of the Tucker Act, this Court has not lightly inferred the United States' consent to suit." United States v. Mitchell, 463 U.S. at 218. For the reasons set forth in Point I regarding the term "money damages" in the APA, Massachusetts does not seek "damages for the Government's past acts, the essence of a Tucker Act claim for monetary relief." United States v. Mottaz, 476 U.S. 834, 851 (1986) (citation omitted).[28/] Since the Secretary himself equates the term "money damages" in the

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28/ Cf. Maryland v. Dept. of HHS, 763 F. 2d at 1450 (action for review of Title XX disallowance not cognizable under Tucker Act because Title XX does not "mandate compensation" for damages sustained); Delaware Div. of Health v. U.S. Department of HHS, 665 F. Supp. at 1117 (action for judicial review of Medicaid disallowance not a "claim" against the United States under section 1491).

APA with Tucker Act jurisdiction, the Tucker Act does not apply to this case unless it can be characterized as a suit for "money damages" outside the APA.

Furthermore, the Secretary's argument relies upon a mischaracterization of Medicaid as a program in which the States "demand payment" under a statute that "requires the federal government to pay the grantee money. . . ." Sec. Br. at 17 n. 14. The Medicaid Act does not authorize "damage" awards. It is not even monetary in its purpose. The Act represents a Congressional statement of federal cooperation in the provision of important human services. See 42 U.S.C. § 1396; Harris v. McRae, 448 U.S. 297, 308 (1980). The Secretary has cast himself as a mere paymaster, rather than

as a partner in a joint effort to serve people in need. But the Secretary's latest incarnation cannot transform the federal share of reimbursement into "damages sustained" by a State.

B. Even if the Tucker Act Applies to Some Portion of this Case, It Does Not Deprive The District Court of Jurisdiction.

The district court had jurisdiction over this case. The court of appeals incorrectly concluded otherwise. However, even if, as that court hypothesized, the Tucker Act deprives the district court of jurisdiction over some aspect of the case, the Tucker Act does not entirely deprive the district court of jurisdiction. See Sec. Br. at 36-46.

The Secretary admits that if only funding for future services were at

issue (i.e., if the Commonwealth "foregoes. . . recovery" as to "prejudgment events"), the district court would have authority to grant "nonmonetary" relief. Sec. Br. at 15 n. 11. Given that concession, the Secretary cannot maintain that the result reached by the court of appeals is prohibited by statute, and his argument that the Claims Court should be found to have exclusive jurisdiction simply elevates the policy against claim-splitting above the presumption of district court jurisdiction, despite strong evidence of contrary legislative intent.

The Secretary also argues that if the Commonwealth's case is cognizable under the Tucker Act, then the APA does not apply because, under section 702(2),

the Tucker Act "impliedly forbids" the relief sought. Sec. Br. at 44-46. Thus the Secretary argues that even as to the vitally important questions of Medicaid coverage, a State may obtain reversal of a disallowance only in the Claims Court, because any action which follows a disallowance and does not waive relief as to past services is, at least in part, an action for a money judgment within the exclusive jurisdiction of the Claims Court.

The Secretary's argument overlooks the legislative history of section 702(2). The history shows that, as to the Court of Claims, the section was intended only to protect the jurisdiction of that court over government contracts disputes. See H.R. Rep. No. 94-1656 at 12-13. Even if a broader reading of

the APA is supportable, the Secretary's application of section 702(2) ignores the fact that, at the time of the enactment of the APA amendments of 1976, one circuit court of appeals had already held that Medicaid disallowances were reviewable in the district courts. See County of Alameda v. Weinberger, 520 F. 2d 344 (9th Cir. 1975). Thus the Secretary would impute to Congress in 1976 the view that the Tucker Act, at that time, forbade district court jurisdiction over grant disputes which had already been determined by a court of appeals.[29/]

29/ The Secretary's argument is also refuted by cases which have held that the district court does not lose jurisdiction over a claim for nonmonetary relief even if a judgment for such relief may form the basis for a later money judgment. See, e.g., Hahn v. United States, 757 F. 2d 581, 589 (3d Cir.

(footnote continued)

In sum, the Tucker Act does not "impliedly forbid" district court jurisdiction over this case, even if some portion of the case were cognizable under the Tucker Act. If "claim-splitting" were to result, it would be the inevitable and tolerable by-product of the interplay of the APA and the Tucker Act. Since the Secretary concedes that the district courts have jurisdiction to review disallowances in some circumstances, his concern for claim-splitting reduces to a policy concern best directed to Congress, not the Court.

(footnote continued)

1985). See also Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 71 n. 15 (1978).

CONCLUSION

The judgments of the court of appeals should be affirmed in part and reversed in part, and the cases should be remanded with instructions to reinstate the judgments of the district court.

Respectfully submitted,

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APPENDIX

5 U.S.C. § 702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be

entered against the United States; Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) Compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 1295(a)

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction --

(1) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights or trademarks and no other claims under section 1338(a) shall be governed by

sections 1291, 1292, and 1294 of this title;

(2) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive

department providing for internal revenue shall be governed by section 1291, 1292, and 1294 of this title;

(3) of an appeal from a final decision of the United States Claims Court. . . .

28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1346(a)

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not

sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. . . .

28 U.S.C. § 1491

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive

department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or

executive body or official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

42 U.S.C. § 1316

(a)(1) Whenever a State plan is submitted to the Secretary by a State for approval under subchapter I, VI, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, he shall, not later than 90 days after the date the plan is submitted to him, make a determination as to whether it conforms to the requirements for approval under such subchapter. The 90-day period provided herein may be extended by written agreement of the Secretary and the affected State.

(3) Any State which is dissatisfied with a final determination made by the Secretary on such a reconsideration or a final determination of the Secretary

under section 304, 604, 804, 1204, 1354, 1384, or 1396c of this title may, within 60 days after it has been notified of such determination, file with the United States court of appeals for the circuit in which such State is located a petition for review of such determination. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his determinations as provided in section 2112 of Title 28.

(b) For the purposes of subsection (a) of this section, any amendment of a State plan approved under subchapter I, VI, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, may, at the option of the

State, be treated as the submission of a new State plan.

(c) Action pursuant to an initial determination of the Secretary described in subsection (a) of this section shall not be stayed pending reconsideration, but in the event that the Secretary subsequently determines that his initial determination was incorrect he shall certify restitution forthwith in a lump sum of any funds incorrectly withheld or otherwise denied.

(d) Whenever the Secretary determines that any item or class of items on account of which Federal financial participation is claimed under subchapter I, VI, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, shall be disallowed for such participation, the State shall be

entitled to and upon request shall receive a reconsideration of the disallowance.

42 U.S.C. § 1396c

If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this title [42 U.S.C. §§ 1396a et seq.], finds --

(1) that the plan has been so changed that it no longer complies with the provisions of section 1902 [42 U.S.C. § 1396a]; or

(2) that in the administration of the plan there is a failure to comply substantially with any such provision;

the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

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Nos. 87-712 and 87-929

In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH and HUMAN SERVICES, ET AL., PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, CROSS-PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF HEALTH and HUMAN SERVICES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONERS/ CROSS-RESPONDENTS

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TABLE OF AUTHORITIES

Page

Cases:

Bakersfield City Sch. Dist. v. *Boyer*, 610 F.2d 621 (9th Cir. 1979) 10
Block v. *North Dakota*, 461 U.S. 273 (1983) 10
Bull v. *United States*, 295 U.S. 247 (1935) 4
Burlington School Committee v. *Massachusetts Department of Education*, 471 U.S. 359 (1985) 5
Chappell v. *Wallace*, 462 U.S. 296 (1983) 3
Chula Vista City Sch. Dist. v. *Bennett*, 824 F.2d 1573 (Fed. Cir. 1987), cert. denied, No. 87-909 (Jan. 25, 1988) 10
Council of the Blind v. *Regan*, 709 F.2d 1521 (D.C. Cir. 1983) 12, 16
County of Alameda v. *Weinberger*, 520 F.2d 344 (9th Cir. 1975) 9
Edelman v. *Jordan*, 415 U.S. 651 (1974) 6
Erika, Inc. v. *United States*, 634 F.2d 580 (Ct. Cl. 1980), rev'd, 456 U.S. 201 (1982) 16
Foote Mineral Co. v. *United States*, 654 F.2d 81 (Ct. Cl. 1981) 3
Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962) 10
Gratehouse v. *United States*, 512 F.2d 1104 (Ct. Cl. 1975) 16
Harris v. *United States*, 8 Cl. Ct. 299 (1985) 16
Hawaii v. *Gordon*, 373 U.S. 57 (1963) 10
Heisig v. *United States*, 719 F.2d 1153 (Fed. Cir. 1983) ... 3
Hewitt v. *Helms*, No. 85-1630 (June 19, 1987) 3
Hoopa Valley Tribe v. *United States*, 596 F.2d 435 (Ct. Cl. 1979) 16
Julius Goldman's Egg City v. *United States*, 556 F.2d 1096 (Ct. Cl. 1977) 3
King v. *United States*, 390 F.2d 894 (Ct. Cl. 1968), rev'd, 395 U.S. 1 (1969) 15
Long v. *United States*, 12 Cl. Ct. 174 (1987) 16
Maryland Department of Human Resources v. *Department of Health & Human Services*, 763 F.2d 1441 (D.C. Cir. 1985) 5, 12, 13

Cases—Continued: Page

Massachusetts v. *Departmental Grant Appeals Bd.*, 815 F.2d 778 (1st Cir. 1987) 8, 12
Miguel v. *McCarl*, 291 U.S. 442 (1934) 2
Minnesota v. *United States*, 305 U.S. 382 (1939) 10
Mitchell v. *United States*, 664 F.2d 265 (Ct. Cl. 1981), aff'd, 463 U.S. 206 (1983) 2, 10, 12, 13
National Ass'n of Counties v. *Baker*, No. 87-5287 (D.C. Cir. Mar. 11, 1988) 13
New York Airways, Inc. v *United States*, 369 F.2d 743 (Ct. Cl. 1966) 10
Pauley Petroleum, Inc. v. *United States*, 591 F.2d 1308 (Ct. Cl. 1979) 12
Richardson v. *Morris*, 409 U.S. 464 (1973) 7
Roberts v. *United States*, 176 U.S. 221 (1900) 2
Rothman v. *United States*, 219 Ct. Cl. 595 (1979) 16
Sarasota v. *EPA*, 799 F.2d 674 (11th Cir. 1986) 7
Spokane Valley Gen. Hosp. v. *United States*, 688 F.2d 771 (Ct. Cl. 1982) 10
Springdale Convalescent Center v. *Mathews*, 545 F.2d 943 (5th Cir. 1977) 2
Train v. *City of New York*, 420 U.S. 35 (1975) 2
United States v. *Jones*, 131 U.S. 1 (1882) 12
United States v. *Mottaz*, 476 U.S. 834 (1986) 13
United States v. *Shaw*, 309 U.S. 495 (1940) 4
United States v. *Testan*, 424 U.S. 392 (1976) 17
Vietnam Veterans of America v. *Secretary of the Navy*, No. 86-5547 (D.C. Cir. Mar. 29, 1988) 14
Whitecliff, Inc. v. *United States*, 536 F.2d 347 (Ct. Cl. 1976), cert. denied, 430 U.S. 969 (1977) 10

Statutes:

Administrative Procedure Act, 5 U.S.C. (& Supp. IV) 551 *et seq.*:
5 U.S.C. (Supp. IV) 702 (§ 10(a)) 2
5 U.S.C. (Supp. IV) 702(2) (§ 10(a)) 15
5 U.S.C. 704 (§ 10(c)) 2, 11, 12, 14, 16, 18
Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 9

Statutes—Continued: Page

Tucker Act:
28 U.S.C. 1491 2
28 U.S.C. 1491(a)(2) 16
20 U.S.C. 1415(e)(2) 5
28 U.S.C. 1295(a)(3) 10
28 U.S.C. 1631 18
42 U.S.C. (Supp. III) 1316(d) 9
42 U.S.C. 1396b(a) 13

Miscellaneous:

Brenner, *Judicial Review by Money Judgment in the Court of Claims*, 21 Fed. B.J. 179 (1961) 3
Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 387 (1970) 2
H.R. Rep. 92-1023, 92d Cong., 2d Sess. (1972) 16
H.R. Rep. 94-1656, 94th Cong., 2d Sess. (1976) 7
S. Doc. 248, 79th Cong., 2d Sess. (1946) 12
S. Rep. 92-1066, 92d Cong., 2d Sess. (1972) 16
S. Rep. 94-996, 94th Cong., 2d Sess. (1976) 7
S. Rep. 97-275, 97th Cong., 2d Sess. (1982) 10
Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. (1970) 6, 8

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1. Respondent brought this action in the district court in an effort to establish its right to $11.3 million in additional Medicaid reimbursement for the years 1978-1982.[1] The first

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[1] In this reply brief, we use "respondent" to refer to respondent/cross-petitioner the Commonwealth of Massachusetts; "Resp. Br." to refer to respondent's brief; "petitioners" or "the Secretary" to refer to petitioners/cross-respondents the Secretary of Health and Human Services, et al.; "Pet. Br." to refer to our opening brief; "Ala. Br." to refer to the brief for the States of Alabama, et al., as amici curiae; "Calif. Br." to refer to the brief for the State of California as amicus curiae; "CSG Br." to refer to the brief for the Council of State Governments, et al., as amici curiae; "Grimesy Br." to refer to the brief for Victoria Grimesy, et al., as amici curiae; and "N.Y. Br." to refer to the brief for the State of New York as amicus curiae.

question presented is whether, in so doing, respondent sought a money judgment that the district court was not empowered to render. We showed in our opening brief (Pet. Br. 13-34) that the district court cannot enter a judgment requiring the federal government to pay money in the absence of a waiver of sovereign immunity, and that the only waiver that might apply to this case in the district court is Section 10(a) of the Administrative Procedure Act (APA), 5 U.S.C. (Supp. IV) 702, which permits only "[a]n action * * * seeking relief other than money damages." [2] We also showed (Pet. Br. 34-35) that Section 10(c) of the APA, 5 U.S.C. 704, would preclude this action even if the "money damages" exclusion in Section 702 did not apply, because respondent has a Tucker Act (28 U.S.C. 1491) remedy that is, in the words of Section 704, an "other adequate remedy in a court."

[2] Some amici dispute even the threshold proposition that a waiver of sovereign immunity is necessary (Ala. Br. 26-28). They contend that there exists an exception to the general principle of sovereign immunity, not grounded in any statute, whereby an action seeking to force the federal government to pay money is permitted whenever the money would come from funds appropriated to a specific program. This Court's cases, however, support no such expansive exception. Such cases as *Miguel* v. *McCarl*, 291 U.S. 442 (1934), and *Roberts* v. *United States*, 176 U.S. 221 (1900), stand only for the proposition that courts can issue orders in the nature of mandamus to compel performance of a clear or ministerial duty to pay money. See Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 387, 403-404 (1970). It was the " 'ministerial' " nature of the duty to pay (rather than to impound) appropriated funds that allowed this Court to adjudicate *Train* v. *City of New York*, 420 U.S. 35 (1975), without a waiver of sovereign immunity (see 420 U.S. at 41 n.7). Neither *Train* v. *City of New York* nor any other decision of this Court can even remotely be read to stand for the proposition that intricate questions of statutory construction concerning the precise amount of federal funds to be paid to a particular claimant can be adjudicated without a waiver of sovereign immunity, simply because a general appropriation covers those funds. To the contrary, it remains "axiomatic that the United States may not be sued without its consent" (*United States* v. *Mitchell*, 463 U.S. 206, 212 (1983)), and a mere appropriation of funds to be used for a particular program hardly represents consent of the sovereign to all lawsuits involving those funds. The suggestion to the contrary in *Springdale Convalescent Center* v. *Mathews*, 545 F.2d 943, 950 (5th Cir. 1977), is in error.

a. (i) Respondent's principal argument is that, because it sought judicial review of an agency decision, respondent somehow did not seek "money damages" within the meaning of the APA (Resp. Br. 4, 21-22, 24, 32-34, 43-47, 62). This argument rests on a false dichotomy. "Judicial review" is a *means* by which an aggrieved party seeks to force the government to do something—to pay money, to conduct itself in a certain way, or to do both.[3] See generally *Hewitt* v. *Helms*, No. 85-1630 (June 19, 1987), slip op. 5. The APA's exclusion of "money damages" focuses not on the means but on the *end* the party seeks to achieve: sovereign immunity is waived if "money damages" are not sought; if money damages are sought then the party seeking them must look elsewhere for a waiver of sovereign immunity. The mere fact that the federal government's obligation to pay money can be made clear by a "reversal" of its decision that it is not obligated to pay does not convert the lawsuit into something other than an action for money.[4] If it did, then the exclusion of

[3] Thus, even though the Tucker Act applies only to cases in which the plaintiff seeks a money judgment (see Pet. Br. 18-20 & n.16), such an adjudication is often referred to as "judicial review." See, *e.g.*, *Heisig* v. *United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983) ("judicial review" of decision of Army Board for the Correction of Military Records); *Foote Mineral Co.* v. *United States*, 654 F.2d 81 (Ct. Cl. 1981) ("judicial review" of Interior Board of Land Appeals decision denying refund of mineral royalties); *Julius Goldman's Egg City* v. *United States*, 556 F.2d 1096 (Ct. Cl. 1977) ("judicial review" of determination by Secretary of Agriculture of fair market value of poultry for whose destruction he was statutorily obligated to compensate plaintiff); Brenner, *Judicial Review by Money Judgment in the Court of Claims*, 21 Fed. B.J. 179 (1961); see also *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983) ("judicial review" of decision of Board for Correction of Naval Records).

[4] For example, if the district court's judgments in this case had not been appealed, and petitioners had simply refused to pay the $11.3 million at issue for the 1978-1982 period, there can be no doubt that the district court would have regarded that refusal as contempt of court—even though the court never entered an order that said, in so many words, "pay the Commonwealth of Massachusetts" a specified sum of money. Respondent itself states that jurisdiction should not be based on "the bare possibility that the Secretary will contemn the judgment" (Resp. Br. 38), and that, of course, is exactly the point: the judgments entered by the district court in this case have precisely the same effect, unless the Secretary disobeys them, as money judgments.

"money damages" would be meaningless, and all complaints seeking the payment of money could be phrased so as to seek "judicial review" and "reversal" of the refusal to pay. Cf. Pet. Br. 21-23.[5]

A related argument contends that respondent's demand for payment of money somehow does not seek "money damages" because any actual payment by the federal government would take the form of an upward adjustment to respondent's future Medicaid grants (just as the recoupment of the amounts disallowed by the Grant Appeals Board took the form of a downward adjustment to a grant for a period long after the periods in which the disallowed amounts were paid). Amici suggest that this upward adjustment is "like a set-off" (Ala. Br. 25; see also N.Y. Br. 11 ("merely * * * a bookkeeping transaction")). That argument, however, is backwards. When the federal government invokes the process of the courts against someone who allegedly owes it money, and the alleged debtor asserts a right of setoff, then arguably no separate waiver of sovereign immunity is needed. See *Bull* v. *United States*, 295 U.S. 247, 261-262 (1935). But see *United States* v. *Shaw*, 309 U.S. 495, 503 (1940). This is not, however, a case instituted by the federal government to recover money from respondent. The federal government has already recouped the disputed money administratively. Rather, it is a case instituted by *respondent* to augment the amount of money that will be paid by the federal government to it.[6]

[5] The exclusion would likewise be rendered meaningless if the Court were to interpret the complaint in this case as "entirely prospective" (CSG Br. 7) on the ground that the redress it seeks (payment of money in the future), as opposed to the conduct said to give rise to a right to that redress (nonpayment of money in the past), has not yet occurred.

[6] Respondent and several amici assume that an action brought *before* the administrative recoupment took place would not be an action for "money damages" and that it therefore could proceed in district court. On the basis of that assumption, they then assert that it is anomalous to have jurisdiction turn on whether the lawsuit is instituted before or after the recoupment. Resp. Br. 65-66; Ala. Br. 9, 22-23; Calif. Br. 6; CSG Br. 8. If any such anomaly existed, it would be one of Congress's making and one for Congress, not the courts, to correct – if some correction were deemed appropriate. In fact, however, we do not think any distinction need be drawn between pre- and post-recoupment cases. In a pre-recoupment case as in a post-recoupment case, what is at issue is the size of a future payment to the State by the federal government. In both types of cases the plaintiff seeks, based on the legality of past conduct of the parties rather than future conduct, to require the federal government to pay more money than it would otherwise pay. Both kinds of actions therefore seek monetary relief that is excluded by the APA but contemplated by the Tucker Act.

(ii) The complaint in this case clearly seeks additional dollars from the federal government. Respondent and amici endeavor in several ways, however, to demonstrate that an award of such additional dollars under the Medicaid program is not "money damages" within the meaning of the APA.

The proper question to ask, of course, is what *Congress* meant by the term "money damages" in *this* statute. Thus, it is not sufficient to show that "damages" is sometimes used to distinguish one kind of money judgment from another. For example, in *Burlington School Committee* v. *Massachusetts Department of Education*, 471 U.S. 359 (1985), the Court held that a statute authorizing the reviewing court to "grant such relief as the court determines is appropriate" (20 U.S.C. 1415(e)(2)) was broad enough to permit a court to order reimbursement of certain expenditures. In distinguishing such reimbursement from "damages" (471 U.S. at 370-371), the Court was interpreting a statute that did not even use the word "damages," and the decision hardly sheds any light on what that word means in a different statute (the APA), in which it *was* used.

Likewise, it is not sufficient to postulate, without supporting legislative history, a questionable "common law" meaning of the word "damages" that *must* be what Congress had in mind, no matter what the contrary indications in the legislative history (see *Maryland Department of Human Resources* v. *Department of Health & Human Services*, 763 F.2d 1441 (D.C. Cir. 1985) (*MDHR* v. *HHS*); Ala. Br. 25-26; CSG Br. 9; N.Y. Br. 11-13, 17; but see Resp. Br. 68 n.14). Such an argument would have force if "money damages" were a term invariably used with precision to refer only to some well-defined subcategory of money judgments, so that any other usage by Congress would

be a misuse of the term. But, of course, that is not the case: "money damages" is a term regularly used, in Tucker Act jurisprudence and elsewhere, to mean all kinds of money judgments, including judgments requiring the payment of money previously owed but unpaid. See Pet. Br. 18-20 & n.16; *Edelman* v. *Jordan*, 415 U.S. 651, 668 (1974) (referring to an award of welfare benefits alleged to have been illegally withheld as "indistinguishable • • • from an award of damages against the State"); N.Y. Br. 12.

It is therefore necessary to look to the legislative history to discern Congress's meaning. Our opening brief showed that by excluding "money damages" from the APA's waiver of sovereign immunity, Congress meant to exclude all forms of monetary relief (Pet. Br. 24-34). Respondent and amici have produced no convincing contrary evidence.

Virtually the only reference to "damages" in the legislative history that respondent and amici cite is a passage from the memorandum on sovereign immunity that Professor Cramton prepared on behalf of the Administrative Conference. The passage is quoted in its entirety at N.Y. Br. 17. Although the State of New York and other amici (Ala. Br. 26 & nn.36 & 37) choose to emphasize only the sentences in this passage that refer to "compensat[ion] for harms done" and "money damages in tort and contract actions," neither sentence purports to say that this is *all* that is meant by the term "money damages" in the proposed statute. Rather, in the *very same passage* Professor Cramton wrote that "the language of our proposal, which is applicable in terms only to actions 'seeking relief other than money damages,' indicates that sovereign immunity remains as a defense to actions seeking monetary relief." *Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 139 (1970) [hereinafter *1970 Hearing*]. The passage as a whole confirms, rather than contradicts, the explicit statement earlier in the *same* memorandum that "*[a]ll* forms of monetary relief • • • are excluded from the recommendation" (*id.* at 118 (emphasis added)).

In addition, respondent and amici (Resp. Br. 56-57; Ala. Br. 11; N.Y. Br. 10, 15; CSG Br. 10-11) rely on the reference to federal grant-in-aid programs in the committee reports accompanying the 1976 amendments to the APA (S. Rep. 94-996, 94th Cong., 2d Sess. 8; H.R. Rep. 94-1656, 94th Cong., 2d Sess. 9).[7] But those references do not support an exception to the rule, stated throughout the rest of the legislative history, that the APA does not waive sovereign immunity for an action seeking monetary relief. Clearly, it is possible to challenge governmental administration of grant-in-aid programs on grounds that do not give rise to monetary relief.[8] It simply does not follow therefore that one must either adjust the definition of "money damages" in order to give meaning to these references in the legislative history, or create a limited exception for grant-in-aid programs to the otherwise general prohibition on awards of monetary

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[7] Amici Alabama, et al., misleadingly state that these references followed a decision by this Court holding that federal administration of grant-in-aid programs "could not be challenged under the Tucker Act" (Ala. Br. 11 (citing *Richardson* v. *Morris*, 409 U.S. 464 (1973)); cf. Resp. Br. 57 n.11). The cited decision said nothing of the kind. The plaintiffs had filed suit seeking *equitable relief*, and the district court predicated its jurisdiction on the Tucker Act. This Court wrote (409 U.S. at 465 (footnote omitted)):

> The Tucker Act plainly gives district courts jurisdiction over claims against the United States for money damages of less than $10,000 that are "founded . . . upon the Constitution." But the Act has long been construed as authorizing only actions for money judgments and not suits for equitable relief against the United States.

Consistent with the position we assert in this case, the Court's entire focus was on the nature of the relief sought, not the subject matter of the lawsuit.

[8] For example, an agency can simply fail to act on an application for federal funds, and a suit can be brought to compel the agency to act – one way or the other – on the application. In that situation, the court, if it agreed with the plaintiff, would compel the agency to *act* on the applications for funds but would not compel it to *pay* funds. Cf. *Sarasota* v. *EPA*, 799 F.2d 674 (11th Cir. 1986). Alternatively, those who deal with a particular federal grantee may wish to see the grantee cut off from federal funding unless it complies with certain environmental, social, or economic conditions. A lawsuit claiming that the federal government has a legal obligation to enforce such conditions or cut off funding would not seek the payment of money.

relief under the APA. The reference to grant-in-aid programs, after all, comes from the same Cramton memorandum discussed above (see *1970 Hearing* 121), and "Dean Cramton's memorandum, and the congressional reports based on it, should not be cited as implying propositions that they clearly reject." *Massachusetts* v. *Departmental Grant Appeals Bd.*, 815 F.2d 778, 783 n.3 (1st Cir. 1987).[9]

(iii) Respondent and amici make several other arguments in support of permitting respondent to seek a monetary recovery in district court, but these remaining arguments are tied barely, if at all, to the text and legislative history of the APA's exclusion of "money damages." For example, the briefs are replete with arguments to the effect that the Medicaid program has special attributes that assertedly make district court review more appropriate than Claims Court review (Resp. Br. 9 n.3, 26-28, 81-84, 91-93; Ala. Br. 6-8, 19-20; Calif. Br. 1-13; CSG Br. 21 n.13; Grimesy Br. 8-36; N.Y. Br. 3, 7-9). But whether or not Congress *should have* specified a procedure for judicial review of Medicaid disallowance decisions in district court, the fact is that it did not.[10] The task before the Court is to determine

[9] In addition to the Cramton memorandum, other portions of the legislative history discussed in our opening brief show that Congress intended the phrase "money damages" to mean all monetary relief and that those who sought monetary relief would be limited to such remedies as might be available under specific statutes or under the Tucker Act. Amicus the State of New York responds to one passage we quote – a statement by the Chairman of the Administrative Law Section of the American Bar Association (Pet. Br. 30) – by pointing out that the statement was originally drafted in support of a statutory proposal containing different language (N.Y. Br. 16). That is true, but the submission of this same statement in support of the Administrative Conference proposal (which eventually became 5 U.S.C. 702) demonstrates that the exclusion of "money damages" was not meant or understood to be narrower than the exclusion of "monetary relief or specific relief in lieu thereof" in the ABA proposal. To the contrary, the witness understood the language of the Administrative Conference proposal to be "precise statutory language" that would accomplish the same objectives as the ABA proposal (*1970 Hearing* 56).

[10] As we noted in our opening brief (Pet. Br. 6 n.4), in the early years under the Medicaid program the government took the position that the absence of a specific review provision, coupled with certain indications in the legislative history of 42 U.S.C. (& Supp. III) 1316(d), meant that judicial review of Medicaid disallowance determinations was precluded altogether. That argument was rejected in *County of Alameda* v. *Weinberger*, 520 F.2d 344, 347-349 (9th Cir. 1975). The government did not at that time advance, and the court did not consider, the additional argument that there was no waiver of sovereign immunity that would permit a district court as opposed to the Court of Claims (now the Claims Court) to order monetary redress for a disallowance decision. Given the lack of attention to this issue, there is no reason to believe that Congress, when it legislated generally on the subject of waiver of sovereign immunity in 1976, necessarily ratified all prior decisions allowing monetary actions to proceed in district courts. Even less persuasive is the argument of respondent (Resp. Br. 90) that the Federal Courts Improvement Act of 1982 (FCIA), Pub. L. No. 97-164, 96 Stat. 25, somehow ratified decisions (see Resp. Br. 52-53) that – without construing either the Tucker Act or the "money damages" exclusion in the APA – had found district court jurisdiction to review grant disallowance disputes. The FCIA did not substantively amend any of the statutory provisions on which we rely for the proposition that a plaintiff seeking money from the federal government must (in the absence of a specific waiver of sovereign immunity) proceed under the Tucker Act rather than the APA, and inferences from what is *not* said in the legislative history of the FCIA are quite unenlightening.

whether such review may be reconciled with the framework established by other statutes that provide generally for actions against the United States. And the two relevant statutes – the APA and the Tucker Act – look to the nature of the relief sought, not to the subject matter of the lawsuit, in order to allocate jurisdiction between the district courts and the Claims Court.

A theme that nevertheless runs throughout several briefs is the assertion that the Claims Court is a "specialized" tribunal whose jurisdiction depends on the subject matter of the lawsuit – that it is a forum for the resolution of government contracts disputes, civilian and military pay cases, and little else.[11]

[11] Respondent and several amici also disparage the Claims Court as a mere Article I tribunal, and they suggest in various ways that it somehow lacks the dignity to resolve important disputes to which a sovereign State is a party. The only issues before the Court, however, are issues of statutory interpretation. This Court is not asked to decide what jurisdiction the Claims Court and district courts should be assigned, but what jurisdiction they have been assigned, and observations about the source of constitutional authority for those courts do not advance the analysis. Nor does the sovereignty of the States give

But no such limitation can even remotely be found in the words of the Tucker Act (see Pet. Br. 3-4). It is certainly true that "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act" (*United States* v. *Mitchell*, 463 U.S. at 216). But the limitations have to do with the form of relief sought and the content of the relevant statute. There is no general principle excluding from the ken of the Tucker Act grant-in-aid disputes, or Medicaid disputes, or disputes about "important social policies and programs" (N.Y. Br. 3; cf. Resp. Br. 39-42), or disputes about any other subject on which Congress has enacted a statute that "can fairly be interpreted as mandating compensation by the Federal Government" (*Mitchell*, 463 U.S. at 217 (citations and internal quotation marks omitted)).[12] And although the staple of the Claims Court's work admittedly has been government contracts cases, pay cases, and a few other recurrent categories, Tucker Act courts have adjudicated a wide variety of other controversies.[13]

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them any right to sue the United States other than the rights conferred by statutes consenting to suit. See *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983); *Hawaii* v. *Gordon*, 373 U.S. 57 (1963); *Minnesota* v. *United States*, 305 U.S. 382 (1939). In any event, there is no question in this case of depriving anyone of an Article III forum. Claims Court decisions can be appealed under 28 U.S.C. 1295(a)(3) to the United States Court of Appeals for the Federal Circuit, which is an Article III tribunal (see S. Rep. 97-275, 97th Cong., 2d Sess. 2 (1982)).

[12] Indeed, this Court wrote in *Mitchell* that the Tucker Act "makes absolutely no distinction between claims founded upon contracts and claims founded upon other specified sources of law" (463 U.S. at 216).

[13] See, *e.g.*, cases cited in note 3, *supra*; *Chula Vista City Sch. Dist.* v. *Bennett*, 824 F.2d 1573 (Fed. Cir. 1987) (federal Impact Aid to local educational agencies), cert. denied, No. 87-909 (Jan. 25, 1988); *Spokane Valley Gen. Hosp.* v. *United States*, 688 F.2d 771 (Ct. Cl. 1982) (Medicare reimbursement); *Whiteciff, Inc.* v. *United States*, 536 F.2d 347 (Ct. Cl. 1976) (Medicare reimbursement), cert. denied, 430 U.S. 969 (1977); *New York Airways, Inc.* v. *United States*, 369 F.2d 743 (Ct. Cl. 1966) (subsidies for transportation of mail under order of Civil Aeronautics Board); see also *Bakersfield City Sch. Dist.* v. *Boyer*, 610 F.2d 621, 627-628 (9th Cir. 1979). The opinion of Justice Harlan in *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), observed that "[t]he cases heard by the Court [of Claims] have been as intricate and far-ranging as any coming within the federal-question jurisdiction * * * of the District Courts" (370 U.S. at 556-557; see also *id.* at 573-574).

Thus, it is not in the least unnatural to believe that Congress, in enacting the 1976 amendments to the APA, did what the legislative history indicates it intended to do: open the district courts up to actions not seeking monetary relief, but leave non-tort money cases, whatever their subject matter, governed by the Tucker Act (see Pet. Br. 31-32). Although the legislative history cites contract cases most frequently as an *example* of Tucker Act cases left unaffected by the new Section 702, this natural emphasis on the most familiar kind of Tucker Act case hardly means (see Resp. Br. 64-65, 102; Ala. Br. 26 n.37; N.Y. Br. 13 n.9; CSG Br. 16) that those are the only cases that the APA's waiver of sovereign immunity does not reach.

b. As we argued in our opening brief (Pet. Br. 34-35), even if respondent's action is not a request for "money damages" within the meaning of the APA, it would be inappropriate—at least insofar as respondent seeks a judgment that would directly enable it to obtain $11.3 million in Medicaid reimbursement for years past—to allow respondent to sue under the APA, because respondent could obtain the same judgment from the Claims Court (assuming the correctness of its position on the merits).[14] Thus, this is not a case involving "final agency action for which there is no other adequate remedy in a court" (5 U.S.C. 704).

Respondent and amici respond to this argument in two ways. First, they contend that Section 704 does not really mean what it says, that "nonstatutory" APA review is available only when there is no other adequate remedy in a court (Resp. Br. 71-72; N.Y. Br. 6-7, 17 n.11). Second, they surprisingly contend that the Claims Court would not have jurisdiction, so that the Tucker Act remedy is inadequate because it is nonexistent (Resp. Br. 29-30, 97-99; cf. Ala. Br. 24 n.34).

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[14] For purposes of jurisdictional arguments, we of course assume that respondent has a meritorious claim. It is by no means true, however, that "[t]he Secretary no longer disputes that the Medicaid statute covered the services the Commonwealth provided to mentally retarded citizens" (CSG Br. 6). If the court of appeals is held by this Court to have jurisdiction, then we will of course be bound by its determinations. But we believe that the court lacked jurisdiction, and if this Court agrees then we intend to litigate the merits vigorously in the Claims Court, which does have jurisdiction.

However, notwithstanding dicta in *Massachusetts* v. *Departmental Grant Appeals Bd.*, 815 F.2d at 784, there is no basis for reading Section 704 as a mere requirement of exhaustion of administrative remedies and ripeness, rather than what it purports to be: a statute precluding nonstatutory review under the APA when there exists another adequate remedy in a court. See, *e.g.*, *Council of the Blind* v. *Regan*, 709 F.2d 1521, 1531 (D.C. Cir. 1983) (en banc) (reading Section 704 literally). The legislative history of this provision is quite scanty. See S. Doc. 248, 79th Cong., 2d Sess. 8, 37-38, 213, 276-277 (1946) (reprinting committee reports). It certainly supports the proposition that *one* purpose of Section 704 was to codify requirements of exhaustion and ripeness. But nowhere does it say, or even intimate, that this was its *only* purpose. Moreover, there can be no claim that the literal reading is nonsensical or inconsistent with any other provision of the APA. Congress could quite reasonably conclude that nonstatutory review should be confined to cases of true necessity – where there is "no other adequate remedy in a court" – since a broader form of nonstatutory review might render redundant or otherwise interfere with carefully limited provisions for statutory review.

The contention that no Tucker Act remedy exists in this case is also without foundation. Far be it from us to "ignore[] the rule that in 'determining the general scope of the Tucker Act, this Court has not lightly inferred the United States' consent to suit' " (Resp. Br. 97-98 (quoting *Mitchell*, 463 U.S. at 218)). But "there is simply no question that the Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages" (*Mitchell*, 463 U.S. at 218).[15] And respondent's statutory sub-

[15] We showed in our opening brief (Pet. Br. 18-20) that whatever the term "money damages" means under the APA, this term clearly encompasses all claims for monetary relief when used to describe the prerequisite to Tucker Act jurisdiction. See *United States* v. *Jones*, 131 U.S. 1 (1882); *MDHR* v. *HHS*, 763 F.2d at 1447; *Pauley Petroleum, Inc.* v. *United States*, 591 F.2d 1308, 1315-1316 (Ct. Cl. 1979). Respondent ignores this portion of our brief in its repeated assertions (Resp. Br. 29, 60-61, 69-70, 99) that we have argued that term has the same meaning under both Acts and that therefore a narrow

stative right to repayment for valid Medicaid expenditures could not be clearer: "the Secretary • • • shall pay" the money under 42 U.S.C. 1396b(a) when the State has a valid claim for reimbursement.[16] If the Medicaid Act did not mandate the payment

meaning of "money damages" in APA jurisprudence would necessarily require an equally narrow meaning of the term as used in Tucker Act jurisprudence.

United States v. *Mottaz*, 476 U.S. 834 (1986), does not redefine the term "money damages" in any way that makes a Tucker Act remedy unavailable in this case. The facts of *Mottaz* were sui generis: the plaintiff claimed title to a disputed parcel of land, and she sought the two-step remedy of recognition of her title followed by a required purchase of the land by the government, a remedy "appropriate" on the particular facts of that case because of the location of the land within a national forest (476 U.S. at 851). The Court therefore drew a distinction between "damages for the Government's past acts, the essence of a Tucker Act claim for monetary relief," and the unusual forward-looking remedy sought by the *Mottaz* plaintiff (*ibid.*). The Court said nothing to indicate that it was adopting a general redefinition of the word "damages," which in prior Tucker Act cases has been used to encompass all forms of monetary relief for the federal government's past acts.

[16] The determination whether a statute can fairly be read as mandating compensation is not, as the District of Columbia Circuit recently suggested, the same as the question whether Congress intended to create an "implied cause of action" in that statute. See *National Ass'n of Counties* v. *Baker*, No. 87-5287 (D.C. Cir. Mar. 11, 1988), slip op. 10; see also *MDHR* v. *HHS*, 763 F.2d at 1450-1451. "If the source of the substantive right can be fairly read as mandating compensation by the Government, it is needless for Congress to add expressly in that statute that suit may be maintained in this court (or elsewhere) to obtain such monetary compensation. The Tucker Act • • • perform[s] that function of giving Congressional consent to jurisdiction in this court over such pecuniary claims. Classic instances of legislation directing compensation, and therefore grounding suit in this court, are the statutes providing for military and civilian pay and allowances (which have not, of course, themselves mentioned suit or the right to sue)." *Mitchell* v. *United States*, 664 F.2d 265, 268 (Ct. Cl. 1981) (footnote omitted), aff'd, 463 U.S. 206 (1983), see *id.* at 281 (Nichols, J., concurring and dissenting) ("The Supreme Court obviously never intended to withdraw jurisdiction over a class of case where legislation other than the Tucker Act can be said • • • to 'mandate compensation' in money. The references • • • to 'money damages' in connection with rights created outside the Tucker Act • • • [are] a shorthand way of saying the other legislation must mandate the payment of money in terms readily expressible as money damages in case the mandated duty is not performed."). As our petition for a writ of certiorari in *Mitchell* said (at 14): "[T]he Court of Claims • • • reasoned • • • that the necessary consent to suit may be inferred from a

of money by the federal government, it is hard to see how respondent would have *any* legally enforceable rights of the sort it asserts in this lawsuit.

2. If we have succeeded in showing that the interplay of the APA and the Tucker Act requires that respondent's request for monetary relief be adjudicated in the Claims Court rather than the district court, then the Court must decide the second question presented: whether that statutory division of jurisdiction—actions seeking money in the Claims Court, actions seeking relief other than money in the district court—allows a single lawsuit seeking both monetary relief and prospective relief to be split into two actions, with the district court taking jurisdiction over the "prospective" part of the suit and the Claims Court over the "retrospective" part. Such claim splitting, by allowing the district court to resolve all common legal issues in the course of considering the plaintiff's request for declaratory or injunctive relief, which resolution then becomes binding on the Claims Court by operation of collateral estoppel,[17] effectively nullifies the congressional objective of centralizing the adjudication of claims for money damages against the United States in a single forum. In addition, claim splitting will inevitably give rise to confusion, delay, intercircuit conflicts, and forum shopping. We showed in our opening brief that this simply could not have been Congress's intent (Pet. Br. 38-43), that 5 U.S.C. 704 precludes such an assertion of district court jurisdiction because

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statute that directs payment of a particular sum of money to an individual. With this we have no quarrel, for a statute that creates a right to payment of money can fairly be interpreted as mandating the availability of a damages remedy; without the damages remedy the substantive right would be empty. See, *e.g.*, *United States* v. *Hvoslef*, 237 U.S. 1, 10 (1915); *Medbury* v. *United States*, 173 U.S. 492, 497 (1899) • • •."

[17] We observed in our opening brief that res judicata principles usually prohibit a plaintiff from first asserting his equitable claims in one action and then seeking money in a separate action (Pet. Br. 39 n.33). The District of Columbia Circuit recently agreed that preclusion of such belated money claims "would appear to be the expected result under black letter principles." *Vietnam Veterans of America* v. *Secretary of the Navy*, No. 86-5547 (D.C. Cir. Mar. 29, 1988), slip op. 13.

(at least in the circumstances of this case) respondent's Tucker Act remedy is "adequate" (Pet. Br. 43-44), and that 5 U.S.C. 702(2) precludes such an assertion of district court jurisdiction because the Tucker Act "impliedly forbids" the nonmonetary relief sought (Pet. Br. 44-46).

Respondent has done much to confirm that the only relief needed or appropriate on the facts of this (or any similar) case is available from the Claims Court. Respondent recognizes that the district court entered no injunction (Resp. Br. 19). Nor did the court of appeals do so. Therefore, what would restrain petitioners from taking action inconsistent with the decisions below is not any threat of contempt for disobeying an injunctive order, but instead the stare decisis effect of the reasoning of those decisions. Respondent also acknowledges that it was satisfied with the relief it obtained below, and that nothing else was necessary to accomplish the purposes of this lawsuit (*id.* at 21-22, 32-33, 35, 68 & n.14). What respondent fails to acknowledge, however, is that the very same relief is and was available from the Claims Court in the form of a money judgment and/or remand, and the accompanying statement of law that would bind petitioners in their future dealings with respondent. Any decision by the Claims Court would have no less and no more of a restraining effect than the judgments entered by the courts below. See *King* v. *United States*, 390 F.2d 894, 905 (Ct. Cl. 1968) ("Any judgment of this court will inevitably have a restraining effect upon Government operations. This is true of money judgments • • •. A judgment awarding money to a particular plaintiff can be authoritative information to officials that their conduct was unlawful and that, unless their position is altered, similar judgments may be rendered in the future."), rev'd on other grounds, 395 U.S. 1 (1969).

In these circumstances, it is simply wrong to describe the relief available in the Claims Court as anything short of "complete" (CSG Br. 20). It is equally wrong to maintain that "[t]he Tucker Act remedy • • • is wholly inadequate because the Claims Court cannot provide the declaratory and injunctive relief available in the district court" (Ala. Br. 12; see Resp. Br. 72). Respondent and amici have confused the question whether

the Claims Court can provide the *same* relief with the question posed by the APA, which is whether the Claims Court can afford an "*adequate* remedy" (5 U.S.C. 704 (emphasis added)). See *Council of the Blind* v. *Regan*, 709 F.2d at 1532 (distinguishing proposition that relief plaintiffs sought under the APA was "*more effective*" from the Section 704 criterion that non-APA relief be "*inadequate*").

Consequently, the efforts by respondent and amici to show that the Claims Court does not have the same equitable powers as the district court (Resp. Br. 72-76; Ala. Br. 12-15; CSG Br. 11-14)—although correct in some respects—are quite beside the point.[18] Congress's deliberate decision not to give the Claims

[18] Although the powers of the Claims Court are indeed limited in some important ways, they are not as limited as respondent and amici argue. The court has the power "[i]n any case within its jurisdiction" to "remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just" (28 U.S.C. 1491(a)(2)). Respondent and amici correctly note that this power was not intended to allow the Claims Court to enter declaratory and injunctive relief, but they are incorrect in asserting that the power is one that can only be exercised in government contract cases (Resp. Br. 75; Ala. Br. 14 n.18). The impetus for this provision was a set of problems that had arisen in government contract cases (see S. Rep. 92-1066, 92d Cong., 2d Sess. 3 (1972); H.R. Rep. 92-1023, 92d Cong., 2d Sess. 4 (1972)), but the committee reports that respondent and amici cite contain no hint that the congressional intention was to *limit* use of the remand power to such cases, despite the plain language allowing remand in *any* case within Claims Court (then Court of Claims) jurisdiction. And in fact, the Court of Claims and Claims Court have frequently used this remand power in cases other than government contract disputes. See, *e.g.*, *Rothman* v. *United States*, 219 Ct. Cl. 595, 598 & n.5 (1979) (remand to Department of Health, Education, and Welfare in action for Medicare reimbursement); *Hoopa Valley Tribe* v. *United States*, 596 F.2d 435, 447 (Ct. Cl. 1979) (dictum) (in action to recover timber royalties court has power to order remand to Secretary of the Interior); *Gratehouse* v. *United States*, 512 F.2d 1104, 1112 (Ct. Cl. 1975) (remand to Civil Service Commission in action for reinstatement and backpay); *Long* v. *United States*, 12 Cl. Ct. 174, 176, 177 (1987) (remand to Air Force Board for the Correction of Military records in military pay case); *Harris* v. *United States*, 8 Cl. Ct. 299, 303 (1985) (same); see also *Erika, Inc.* v. *United States*, 634 F.2d 580, 591 (Ct. Cl. 1980) (remand to insurance carrier in Medicare reimbursement dispute), rev'd on other grounds, 456 U.S. 201 (1982). Of course, the Claims Court cannot bring a case within its jurisdiction

Court full equitable powers should be treated as a reason not to afford injunctive and declaratory relief at all, not as something that, ipso facto, renders the Claims Court an inadequate forum in which to litigate any dispute about money that also has implications for the future.

We said in our opening brief that, "[a]lthough the matter is not entirely free from doubt, we believe that plaintiffs also may waive *all* monetary recovery—permanently forgoing any Tucker Act claim arising out of prejudgment events—and thereby litigate their cases for nonmonetary relief in the district court and regional court of appeals" (Pet. Br. 15 n.11). The "doubt" to which we referred arises because it is unclear whether the adequacy of other remedies should be determined before or after the waiver. Before the waiver, the plaintiff has a Tucker Act remedy in the Claims Court, where he could secure any monetary recovery coupled with a determination of the law applicable to his situation. After the waiver, however, it is clear that the only available remedy is in district court.

Perhaps we were overly generous in suggesting that that doubt should be resolved in favor of viewing the plaintiff's situation after the waiver rather than before, but for two reasons we continue to believe that this is the better view. First, a plaintiff who waives all monetary recovery in order to have access to the declaratory and injunctive powers of the district courts demonstrates in a convincing fashion that he has a genuine need for the exercise of those powers. Second, when a court grants injunctive or declaratory relief that goes *solely* to future conduct of the parties, and cannot be used to impose monetary liability of the federal government for past conduct, the principal defect associated with claim splitting—that it nullifies Congress's purpose to centralize money claims against the United States (other than those for which there exists a

by the technique of remanding with directions to award nonmonetary relief that is a prerequisite to monetary relief. *United States* v. *Testan*, 424 U.S. 392, 404 & n.7 (1976). But there is no opportunity for such bootstrapping in this case; respondent seeks and is entitled to the payment of money if the services at issue were covered by the Medicaid statute.

specific waiver of sovereign immunity)—is not implicated, and there is no particular reason to remit the plaintiff to the forum that was set up to give the plaintiff relief that he does not need or want.

But whatever the merits of our supposition that plaintiffs in other situations can invoke the jurisdiction of the district court by waiving their claims to accrued money damages, this issue is not presented by the case before the Court. Respondent has not waived its accrued money claim and has done nothing else to demonstrate a genuine need for any forward-looking relief beyond the binding statement of the law that the Claims Court can provide in the course of adjudicating the claim for past-due money. In these circumstances, it would be quite incorrect and would undermine congressional intent to treat respondent's ability to proceed in the Claims Court as anything less than an "adequate remedy in a court" (5 U.S.C. 704) and to allow preemption of the Claims Court in the manner accomplished by the court of appeals in this case.

For the foregoing reasons and those given in our opening brief, the judgments of the court of appeals should be affirmed in part and reversed in part, and the cases should be remanded with directions to vacate the judgments of the district court in their entirety and to transfer the cases to the Claims Court pursuant to 28 U.S.C. 1631.[19]

Respectfully submitted.

CHARLES FRIED
Solicitor General

APRIL 1988

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[19] We note that, whatever the resolution of the jurisdictional issues before this Court, it would not be appropriate for the Court to do as respondent suggests and remand "with instructions to reinstate the judgments of the district court" (Resp. Br. 105; see also CSG Br. 26). Despite agreeing with the district court on the basic legal question presented by the case, the court of appeals, for reasons independent of jurisdictional defects, found those judgments infirm in part (Pet. App. 7a n.2).

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60395

liable to program beneficiaries. The claim is entirely contingent: that if the court holds the state liable to program beneficiaries, the court should require HHS to provide federal financial participation for the resulting costs.

Further, under United States v. King, 395 U.S. 1, 3 (1968), a Tucker Act claim must be for "actual, presently due money damages." A state's third-party complaint can allege no certain sum. This is not a matter of artful pleading. No amount is "actually, presently due" from HHS. The district court's final order cannot specify an actual, presently due amount, because the court cannot adjudicate an amount. Typically, the state will not know the amount of its claim for federal financial participation until class members complete a claiming process. This may be months or years after completion of proceedings on the merits of the case. The court can only resolve the principle of entitlement to

federal financial participation. This is far from the "actual, presently due" standard of King.

The fact that a declaration of a state's right to federal financial participation may eventually lead to the payment of money is not enough to make it a claim for money damages. "A district court does not lose jurisdiction over a claim for non-monetary relief simply because it may later be the basis for a money judgment." Laguna Hermosa Corp. v. Martin, 643 F.2d 1376, 1379 (9th Cir. 1981) (action seeking declaration of contract rights against United States not a Tucker Act action); Rowe v. United States, 633 F.2d 799 (9th Cir. 1980), cert. denied, 451 U.S. 970 (1981) (action to compel award of oil and gas leases not a Tucker Act claim).

To date, HHS has limited its claim to asserting that the portion of the third party complaint seeking federal participation in the cost of back benefits arises

under the Tucker Act. However, it seems impossible to draw a viable distinction between the claims for participation in prospective relief and back benefits. In both situations, the claim has fiscal consequences, but does not meet any traditional notion of money damages.

We are aware of no case in which an action seeking to direct the government to pay an unspecified amount at an unspecified time in the future for expenses not yet incurred was held to arise under the Tucker Act. In this sense, the third party complaint is distinguishable from a disallowance case, where a state seeks to recover a sum certain based on a specific past act of HHS. However this Court resolves the disallowance issue in the pending case, the Court's opinion should make clear that the Tucker Act does not extend to the circumstance of a state's third party complaint against HHS in beneficiary/state litigation.

C. A finding that the Tucker Act divests a district court of jurisdiction in the Social Security Act third party complaint litigation would cause severe problems of judicial and program administration.

There are strong policy reasons to resolve any uncertainty against finding that the Tucker Act divests district courts from jurisdiction in Social Security Act third party complaint litigation. To the extent that a finding that the district court is without jurisdiction in the disallowance context could lead to a comparable result in the third party complaint context, these policy reasons should militate against finding the district court divested from jurisdiction in the case before the court.

Initially, it is important to recognize that the real dispute is not about whether issues concerning Social Security Act program administration are subject to judicial review; it is about where review

should take place. If the position of the states and program beneficiaries is adopted, a district court can hear the state's third party complaint along with the primary case between beneficiaries and the state, and all issues can be appealed to the appropriate regional circuit. If HHS is correct, the state's third party complaint must go to the Claims Court, with exclusive appellate jurisdiction in the Federal Circuit Court of Appeals. 28 U.S.C. §1295(a)(3).

Adoption of HHS' position would have two undesirable policy impacts: it would lead to fragmented litigation in multiple forums, and it would shift many of the most fundamental issues regarding beneficiary rights and operation of federal grant-in-aid programs from district courts and regional courts of appeals to the Claims Court and the Federal Circuit Court of Appeals. These effects become apparent by considering the impact of a finding that

the Claims Court has exclusive jurisdiction over part or all of a state's third-party complaint.

i. HHS' Position would result in multiple forums and duplicative litigation.

HHS' position would result in duplicative litigation in multiple forums whenever program beneficiaries seek prospective and retroactive relief, and the state files a third party complaint against HHS.

If a court accepted HHS' position that a state claim for FFP for back benefits must be heard in the Claims Court, there would be two possible procedural results. Either the third party complaint would be bifurcated and the back benefits part sent to the Claims Court, or the entire third party complaint sent to the Claims Court. As all parties seem to recognize, bifurcation is undesirable because it results in duplication, confusion, and difficult issues of collateral estoppel. However, even if the entire third party complaint is

sent to the Claims Court, there will still be an unresolvable bifurcation problem.

First, consider the effects of bifurcating the third party complaint. Since issues concerning back benefits are usually substantially identical to those concerning prospective relief,[5] bifurcation at the district court/Claims Court level would merely waste resources. Either one court would consider itself bound by the decision of the other, or each court would consider itself free to consider the merits of the underlying dispute without regard for the other. In either case, no policy would be served by this duplicative litigation.

Even if one court deferred to the other at the trial court level, what would happen on appeal? Conceivably, there could

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[5] Grimesy is atypical in one respect: HHS raised independent defenses to whether it must join in the cost of paying back benefits while no longer defending on the merits of the case. Usually, the legal issues that determine entitlement to prospective relief also determine entitlement to back benefits.

be appeals from either beneficiaries or the state in the primary case; those appeals would go to the regional court of appeals. There could also be appeals from either HHS or the state concerning the third party complaint. Would appeals concerning prospective relief go to the regional circuit and appeals concerning retroactive relief go to the Federal Circuit? If so, how would the two courts of appeal be expected to administer simultaneous appeals on overlapping issues involving the same case? The possibilities for conflict are apparent.

The Grimesy litigation demonstrates that these concerns are real. In Grimesy, HHS initially appealed the order for prospective relief to the Ninth Circuit. It only dismissed the appeal after it concluded that congressional legislation made its appeal moot. Six months after appealing the prospective order to the Ninth Circuit, HHS appealed the order

concerning retroactive benefits to the Federal Circuit.[6] If the first appeal were still pending, would HHS expect both appeals to proceed simultaneously? If the legality of HHS' regulation was relevant to both prospective and retroactive relief, could both appellate courts decide it? Should one court defer to the other? Moreover, what if the beneficiaries had objected to some part of the order for retroactive relief, and also appealed? What if the state appealed either the order for prospective relief, or retroactive relief, or both? Both appellate courts would be asked to resolve identical issues with overlapping parties in components of the same case at the same time. The possibilities for chaos are tremendous under HHS' construction.

The alternative to bifurcating the

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[6] HHS also appealed this order to the Ninth Circuit, but (subsequently) denominated this appeal as a "protective" appeal.

state's third party complaint would be for the Claims Court to exercise pendent jurisdiction over the entire third party complaint. But this would not resolve the procedural morass.

Necessarily, the third party complaint would be bifurcated from the beneficiaries' action against the state, because the Claims Court could not exercise pendent party jurisdiction over the beneficiaries' action. See Uram v. United States, 216 Ct. Cl. 418, 420 (1978) (Court of Claims cannot render judgment against third party unless that party makes claim for money against U.S. or U.S. makes claim for money against third party).

Assuming the third party complaint was bifurcated, which action would proceed first? Logically, the beneficiaries' action should proceed, since the state's third party complaint is wholly contingent. But the state would undoubtedly contend that it is merely following the directions

of the federal government, and that the real dispute is between beneficiaries and HHS. Since HHS is no longer a party in the district court, and beneficiaries cannot be parties in the Claims Court, there is no forum for resolution of their dispute.

Whichever case proceeded first, there would still be the problem of appellate sequence and duplication. Would there be simultaneous appeals in the regional and Federal Circuit? Should one defer to the other? The only alternatives would be for one appellate court to rubber-stamp the other's decision, or risk conflicting decisions by two appellate courts in the same case.[7]

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[7] Under some circumstances, there might even be three appellate courts involved in the same case. In the Grimesy litigation, plaintiffs initially filed their complaint for prospective relief and back benefits in state court, and the state removed the action to federal court. The state agreed to waive the Eleventh Amendment, so that the federal court could issue any back benefit award. Had the state not done so, the federal court would have lacked jurisdiction over the back benefit

(continued...)

These convoluted procedural difficulties are not hypothetical. Grimesy illustrates how they can and will occur if the state third party complaint is held to be, in whole or in part, beyond the jurisdiction of the district court.

ii. HHS' Position would have the effect of creating a national trial court and a National Court of Appeals for Social Security Act litigation.

HHS' position is also undesirable because it would have the effect of centralizing much Social Security Act litigation in the Claims Court and Federal Circuit Court of Appeals. If the basic issues concerning operation of grant-in-aid programs are all centralized in the Claims

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[7](...continued)
claim, Edelman v. Jordan, 415 U.S. 651 (1974), and would have had to remand that claim to state court. At that point, the case could have generated decisions on closely related issues by the state appellate court, regional circuit court of appeals, and Federal Circuit Court of Appeals.

Court and Federal Circuit, the federal judicial structure will be seriously disrupted.

First, neither the Claims Court nor the Federal Circuit Court of Appeals purport to have expertise in issues concerning the grant-in-aid programs under the Social Security Act. In contrast, the district courts and regional courts of appeals have decades of experience in considering such issues.

Second, there is no evidence that Congress, in enacting the Federal Courts Improvement Act of 1982, P. L. No. 97-164, 96 Stat. 25, suggested any expectation that the Claims Court and the Federal Circuit Court of Appeals would now become the primary forums for resolution of issues under the Social Security Act grant-in-aid programs. Indeed, there is not even a reference to such a possibility in the

legislation or its history.[8]

Third, the beneficiaries of Social Security Act programs are typically the poorest members of our society. They would be the most disadvantaged if they were routinely compelled to litigate appellate claims in Washington, D.C. When low income people can obtain representation in civil matters, the representation is typically from legal services organizations with very limited budgets. If significant numbers of the cases necessitate the expense of

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[8] It appears that all of the cases considering the applicability of the Tucker Act to the Social Security Act grant-in-aid programs have arisen after the enactment of the Federal Courts Improvement Act of 1982. See, e.g., Commonwealth of Massachusetts v. Departmental Grant Appeals Board, 815 F.2d 778 (1st Cir. 1987); Maryland Dept. of Human Resources v. Dept. of Health and Human Services, 763 F.2d 1441 (D.C. Cir. 1985); State of Minnesota by Noot v. Heckler, 718 F.2d 852 (8th Cir. 1983). If the United States had envisioned that the Claims Court and Federal Circuit would become major forums for Social Security Act litigation, it is hard to understand why the suggestion was never made to Congress while the FCIA was under consideration.

litigating in Washington, the cost will necessarily reduce resources available for representation in other cases. The original rationale for allowing concurrent district court jurisdiction over Tucker Act claims not exceeding $10,000 was so that litigants with small claims not be forced to expend the resources of litigating in Washington, D.C. It is fundamentally inconsistent with that goal to shift Social Security Act litigation away from local courts to centralized adjudication in Washington.

Fourth, the Claims Court is not only an inconvenient forum for indigent plaintiffs; it also lacks the protections of an Article III court. Its members do not have life tenure, and depend on executive renomination and Congressional reapproval to maintain their positions. This makes it a particularly inappropriate forum for low income persons, who must often bring politically controversial suits seeking to

protect or establish their rights.

Finally, there may be some areas of law where the advantages of resolution in a single forum outweigh the advantages of presenting the issues to various district and appellate courts, but Social Security Act litigation is not such an area. Numerous issues regularly arise under the Act regarding eligibility, benefits, financial determinations, and local administrative practices. Under our federal appellate structure up to now, it has been possible for these issues to be litigated in various forums, so that this Court need only address the issues where conflicts arise in the circuits, or the issues are of exceptional importance. If these cases are centralized in the Claims Court and Federal Circuit, then there will be no opportunity for the winnowing process that normally occurs as issues are heard by a number of courts. Instead, this Court will be forced to either intervene after initial decisions

by a single appellate court, or to leave in the hands of that single court fundamental decisions on areas of crucial concern to low income citizens who rely on the Social Security Act programs.

II. An expansive construction of the Tucker Act raises troublesome implications in other areas of law affecting federal program beneficiaries.

A. Federal Housing Programs

The federal government's contention that any claim that may result in money damages belongs in the Claims Court is not limited to the Social Security Act disallowance context. The government has also raised the Tucker Act issue in cases involving claims by program beneficiaries under the nation's housing laws.[9] It is

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[9] See Thomas v. Pierce, 662 F. Supp. 519 (D. Kan. 1987), appeal pending, Case No. 87-2121 (10th Cir.); Mann v. Pierce, 803 F.2d 1552 (11th Cir. 1986); Conille v. Pierce, 649 F. Supp. 1133 (D. Mass. 1986), aff'd, No. 87-1120 (1st Cir., Feb. 19, 1988); Committee for Fairness, et al., v. Pierce, C.A. No. 87-0324 JHP (D.D.C.); (continued...)

appropriate for the Court to be aware of both the sweeping nature of the government's efforts to redefine the federal judicial scheme, and of the dramatic impact such alteration would have on the right of program beneficiaries to seek redress for grievances historically entertained by the district courts.

Housing cases are often brought in federal district court by tenants or homeowners seeking judicial review of a U.S. Department of Housing and Urban Development (HUD) or Farmers Home Administration (FmHA) decision which has adversely impacted on their right to receive specified housing benefits under the federal housing statutory scheme.[10] While the litigation may result in the expendi-

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[9](...continued)
Council of Large Public Housing Authorities v. HUD, C.A. No. 82-1210 NHJ (D.D.C.).

[10] See cases cited in n.9, supra, and n.12, infra.

ture of monies by HUD or FmHA, this result is secondary to the primary goal of establishing the federal agency's duty to act in a specified manner. Thus, the immediate and prerequisite relief sought is declaratory or injunctive relief.

Nevertheless, as demonstrated below, the federal government's position has been that the plaintiffs must pursue such claims in the Claims Court because the claim will have financial consequences, and that no other independent source of waiver of sovereign immunity exists or is applicable. The following case is illustrative.

In Thomas v. Pierce, 662 F. Supp. 519 (D. Kan. 1987) appeal pending, No. 87-2121 (10th Cir. 1988), low-income tenants sought judicial review of HUD's actions in selling a low-income housing project with only partial subsidy, effectively removing two-thirds of the units from lower-income

use.[11] As in numerous similar cases heard by federal district courts since 1975,[12] plaintiffs sought judicial review pursuant to the Administrative Procedure Act (APA)

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[11] In 1978 Congress enacted legislation establishing standards governing the disposition of HUD-owned multi-family properties. See Housing and Community Development Amendments of 1978, 12 U.S.C. §1701z-11. HUD implemented regulations requiring, inter alia, that formerly subsidized projects, such as the one in Thomas, be sold in a manner to ensure their preservation as decent and affordable housing. 24 C.F.R. §§290.25(b), §290.27(b) (1987).

[12] Both before and after passage of the Housing and Community Development Amendments of 1978, HUD's property disposition decisions have been challenged in court, with cases brought before the 1978 legislation claiming that HUD had not complied with the National Housing Act or national housing goals. See Russell v. Landrieu, 621 F.2d 1037 (9th. Cir. 1980); Tenants for Justice v. Hill, 413 F.Supp. 389 (E.D. Pa. 1975). After Congress codified and expanded these judicial holdings in 1978, HUD's actions continued to be challenged. See Frisby v. HUD, 755 F.2d 1052 (3d Cir. 1985); Paris v. HUD, 713 F.2d 1341 (7th Cir. 1983), subsequent decision sub nom Cowherd v. HUD, 827 F.2d 40 (7th Cir. 1987). Until Thomas, the federal government had not taken the position that the Tucker Act provided exclusive jurisdiction to the Claims Court for claims under the property disposition provisions of the Act.

(5 U.S.C. § 706). Plaintiffs requested declaratory and injunctive relief to require HUD to comply with the statute and regulations, and require HUD to repurchase the project and reprocess it with the required rental subsidies.[13]

In Thomas, the District Court dismissed the case, accepting the federal government's contention that neither 5 U.S.C. §702 of the APA nor 12 U.S.C. §1702 or 42 U.S.C. §1404 of the housing statutes waived HUD's sovereign immunity. Plaintiffs appealed to the Tenth Circuit, where the federal government for the first time contends that the APA waiver is also unavailable because under the Tucker Act, the Claims Court is available for plaintiffs' claim.[14] If the government's

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[13] Plaintiffs in Thomas have also relied on the waiver of sovereign immunity provided in 12 U.S.C. §1702 and 42 U.S.C. §1404a of the Housing Acts for HUD's actions with respect to the Section 8 program.

[14] HUD's brief in Thomas, filed in the Tenth Circuit on January 14, 1988, states, (continued...)

position prevails in Thomas, plaintiffs will be forced to litigate their claim for declaratory and injunctive relief in the Claims Court, with any appeal being heard in the Federal Circuit. Such a result

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[14](...continued)
at p.25:

> From an objective analysis of what the suit will require the sovereign to do, the relief sought is akin to money damages. It will require that HUD obtain (from somewhere) extensive additional money to pay for 88 more Section 8 units over fifteen years. Needless to say, from the sovereign's perspective, this appears to be relief in the form of money damages for which it has not consented to be sued in this forum.[2]

In footnote 2 on page 25, HUD elaborates:

> Under the Tucker Act, 28 U.S.C. §1491, the United States has consented to suit with respect to certain claims for money damages. . . . The Court of Claims is further empowered under the 1972 amendments to 28 U.S.C. §1491 to award limited equitable relief in order to 'provide an entire remedy and to complete the relief afforded by the judgment ...' Thus, the Court of Claims could afford appellants the relief sought. (Emphasis added.)

would run contrary to the accepted and well-established practice of bringing such entitlement or grant-in-aid lawsuits in the district courts.[15]

Thomas represents one step beyond the position being espoused by HHS in its brief in this case. Here, HHS asserts that a claim for prospective relief should be heard in the Claims Court when it is joined with an action challenging a disallowance, because the disallowance action seeks the payment of money. In Thomas, the United States asserts that a claim for declaratory and injunctive relief must be heard in the Claims Court if the relief sought has financial consequences for the government, even though plaintiffs do not seek money from the United States. This view of "money damages" would mean that virtually any case in which program beneficiaries seek injunctive relief to correct wrongful conduct by the United States would be held

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[15] See n.12, supra.

to belong in the Claims Court.

The Thomas position is wholly inconsistent with Congressional intent. There is no evidence of Congressional intent to shift jurisdiction for cases brought by program beneficiaries involving entitlement or grant-in-aid programs to the Claims Court. Indeed, the history of housing program beneficiary litigation demonstrates that until recently, it was accepted practice that such cases could properly be brought in the district courts by a waiver of sovereign immunity provided by either the APA or housing acts. Yet, the government would have the Court turn the APA on its head by depriving district courts of jurisdiction in cases where there is a prospect of monetary expenditures as a result of complying with the court's declaratory or injunctive relief.

Moreover, a review of the litigation arising under federal housing laws demonstrates that the federal government seeks

to deprive district courts cf jurisdiction over any housing case where there will be financial consequences of complying with judicially imposed declaratory or injunctive relief, regardless of the source of authority relied upon by plaintiffs for waiver of sovereign immunity.[16]

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[16] Despite the government's acknowledgement on page 38, n.32 of their brief that there are statutes in which Congress has provided a separate waiver of sovereign immunity to pursue monetary claims, the government has refused to recognize that the waivers contained in 12 U.S.C. §1702 or 42 U.S.C. §1404 of the Housing Acts as sufficient to afford district court jurisdiction over housing cases with monetary consequences. See, e.g., Johnson v. Secretary of HUD, 710 F.2d 1130 (5th Cir. 1983); Merrill Tenant Council v. HUD, 638 F.2d 1086, 1090 (7th Cir. 1981); Trans-Bay Engineers and Builders, Inc. v. Hills, 551 F.2d 370 (D.C. Cir. 1976). Propelled by decisions such as Amoco Prod. Co. v. Hodel, 815 F.2d 352 (5th Cir. 1987), cert. petition pending; New Mexico v. Regan, 745 F.2d 1318 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); and Portsmouth Redevelopment & Housing Authority v. Pierce, 706 F.2d 471 (4th Cir.), cert. denied, 464 U.S. 960 (1983); and as demonstrated in Thomas, supra, the government apparently intends to pursue its position in every housing case where the possibility of monetary consequences exists. This policy is consistent with the government's contention in this case that the "exclusive jurisdiction of

(continued...)

B. Other Federal Programs

Program beneficiaries of a myriad of federal entitlement and grant-in-aid programs seek enforcement of rights and benefits under such programs by challenging conduct of federal agencies in the federal district courts. In programs ranging from food stamps, education, social security, school lunches, to health and welfare benefits, the federal reporters are filled with judicial decisions construing the rights of beneficiaries under such programs in cases heard by the district courts and regional courts of appeals.

The government's position, as it emerges from this case, Grimesy, and Thomas, would fundamentally alter the practice of having such actions heard in district courts, with appeals to the

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[16](...continued)
the Claims Court extends to any case that includes a Tucker Act claim." (Brief of Petitioners/Cross Respondents at p. 41, n.35.)

regional courts of appeals. Virtually any case that was not purely prospective in nature would risk being shifted to the Claims Court and Federal Circuit. Program beneficiaries would be forced to abandon claims seeking correction of wrongful government conduct if they wished to have actions for prospective relief heard in the district courts. This would flow from the fact that virtually every case brought by program beneficiaries seeking declaratory, injunctive or mandatory relief to correct wrongful agency action necessarily has a direct or indirect financial consequence.

While artful pleading should not be permitted to distort a suit for money damages into an equitable action, the converse is equally true: the government should not be permitted to distort suits for equitable relief into ones for money damages.[17] Typically, program benefi-

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[17] See Brief of the Petitioners/Cross Respondents, at p. 22.

ciaries seeking judicial review of alleged agency misconduct sue for injunctive and declaratory relief, not only in form but in reality. They seek judicial review of a policy, regulation or practice which impinges on the ability of the aggrieved beneficiary to obtain statutory entitlements. The relief they seek cannot be provided by the Claims Court. For example, the Claims Court cannot require a federal agency to use Notice-and-Comment rulemaking. It cannot enjoin an agency from arbitrary and capricious action, or require an agency to follow a certain procedure. The Claims Court cannot prohibit an agency from making future decisions. The only thing the Claims Court can do is to order an agency to pay money and any relief necessary to accomplish that act. It can do nothing about preventing an agency from repeating the offending conduct in the future. This kind of relief is available only in the district court.

If this Court were to accept the government's broad view of "money damages", and its broad view of the jurisdictional implications of a claim for "money damages" against the United States, the district courts would be divested from jurisdiction over cases involving government benefits of any type, whenever beneficiaries sought to correct wrongful agency conduct. Such a result would not further Congressional intent, would not lead to a reasonable allocation of responsibilities in the federal court system, and would impair the abilities of federal program beneficiaries to seek relief for wrongful government conduct.

CONCLUSION

This Court should hold that the Tucker Act does not divest a district court from exercising jurisdiction over a disallowance action. If the Court concludes that a disallowance action arises under the Tucker Act, it should make clear that the decision

does not determine the related but distinct issue of Tucker Act jurisdiction for a state's third party complaint seeking to require federal financial participation in an underlying action between beneficiaries and a state.

Respectfully submitted,

March 29, 1988

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Nos. 87-712 and 87-929

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

– against –

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

COMMONWEALTH OF MASSACHUSETTS,

Cross-Petitioner,

– against –

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Cross-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF THE COMMONWEALTH OF MASSACHUSETTS

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
POINT I –	
THE DISTRICT COURTS HAVE JURISDICTION UNDER 28 U.S.C. § 1331 AND 5 U.S.C. § 702 TO DECIDE CLAIMS FOR PROSPECTIVE RELIEF IN CASES CHALLENGING THE DISALLOWANCE OF FEDERAL FUNDS BY THE GRANT APPEALS BOARD AND TO REQUIRE COMPLIANCE WITH THEIR DECISIONS	3
A. The Claims Court cannot grant the injunctive relief which is necessary in this case. Therefore, the Tucker Act does not provide an adequate remedy that would bar district court review under Section 704 of the APA	6
B. The Tucker Act does not impliedly forbid the granting of equitable relief in this case	10
POINT II –	
AN ACTION TO SET ASIDE A DISALLOWANCE DETERMINATION OF THE GRANT APPEALS BOARD IS NOT AN ACTION FOR "MONEY DAMAGES" FOR PURPOSES OF THE APA	11
CONCLUSION	18

TABLE OF AUTHORITIES

Cases	Page
Abbott Laboratories v. Gardner, 387 U.S. 136 (1976)	4
Alabama Rival Fire Ins. Co. v. Taylor, 530 F.2d 1221 (5th Cir. 1976)	7
Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986)	4
Commonwealth of Massachusetts v. Developmental Grant Appeals Board, 815 F.2d 778 (1st Cir. 1987)	6, 7, 11
Commonwealth of Massachusetts v. Secretary of Health and Human Services, 816 F.2d 796 (1st Cir. 1987)	9
Connecticut v. Heckler, 731 F.2d 1052 (2d Cir. 1984), *aff'd*, 471 U.S. 524 (1985)	3, 4
Delaware Division of Social Services v. United States Dep't of Health and Human Services, 665 F. Supp. 1104 (D. Del. 1987)	4
Dermott Special School Dist. v. Gardner, 287 F. Supp. 687 (E.D. Ark. 1968)	10, 15
Dugan v. Rank, 372 U.S. 609 (1963)	14
Hahn v. United States, 757 F.2d 581 (3d Cir. 1985)	9
Heckler v. Lopez, 464 U.S. 879 (1983)	8
Hidalgo v. Bowen, 822 F.2d 294 (2d Cir. 1987)	7

	Page
Illinois Dep't of Public Aid v. Schweiker, 707 F.2d 273 (7th Cir. 1983)	4, 9
International Engineering Co. v. Richardson, 512 F.2d 573 (D.C. Cir. 1975), *cert. denied*, 428 U.S. 1048 (1976)	7
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)	13, 14
Lee County School Dist. No. 1 v. Gardner, 263 F. Supp. 26 (D.S.C. 1967)	10, 15
Maryland Dep't of Human Resources v. Dep't of Health and Human Services, 763 F.2d 1441 (D.C. Cir. 1985)	3, 11, 12, 13, 17
Melvin v. Laird, 365 F. Supp. 511 (E.D.N.Y. 1973)	5
Michigan Dep't of Social Services v. Secretary of Health and Human Services, 744 F.2d 32 (6th Cir. 1984)	3
Miguel v. McCarl, 291 U.S. 442 (1934)	14
Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371 (1945)	14
Minnesota By Noot v. Heckler, 718 F.2d 852 (8th Cir. 1983)	4, 9
New Jersey v. Dep't of Health and Human Services, 670 F.2d 1300 (3d Cir. 1982)	8
New Mexico v. Regan, 745 F.2d 1318 (10th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985)	11

	Page
North Side Lumber Co. v. Block, 753 F.2d 1482 (9th Cir.), *cert. denied*, 474 U.S. 931 (1985)	5
Oregon Dep't of Human Resources v. Dep't of Health and Human Services, 725 F.2d 1411 (9th Cir. 1983)	3
Roberts v. United States, 176 U.S. 221 (1900)	14
Rowe v. United States, 633 F.2d 799 (9th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981)	8
Sharp v. Weinberger, 798 F.2d 1521 (D.C. Cir. 1986)	5, 9
Shaughnessy v. Pedreiro, 349 U.S. 48 (1955)	4
Stieberger v. Heckler, 615 Supp. 1315 (S.D.N.Y. 1985)	7, 8
Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986)	7
Tennessee Dep't of Health and Environment, DGAB Dec. No. 921, December 2, 1987	8
United Public Workers v. Mitchell, 330 U.S. 75 (1947)	6
Utah Dep't of Health, DGAB, Dec. No. 893, August 31, 1987	8
STATUTORY PROVISIONS	
5 U.S.C. §§ 702 *et seq.* (1982 & Supp. IV 1986)	2
5 U.S.C. § 702 (1982 & Supp. IV 1986)	*passim*

	Page
5 U.S.C. § 704 (1982)	6, 7, 17
28 U.S.C. § 1346(a)(2) (1982)	5
28 U.S.C. § 1491 (1982)	2
42 U.S.C. § 1316(a)(3) (1982)	8
42 U.S.C. § 1316(d) (1982)	8
42 U.S.C. §§ 1396-1396q (1982 & Supp. III 1985)	1, 2
42 U.S.C. § 1396(c) (1982)	8

OTHER AUTHORITIES

American Bar Association, Annual Report (1969)	16
Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 Harv. L. Rev. 1479 (1962)	16
Crampton, *Nonstatutory Review of Federal Administrative Actions: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 387 (1970)	10, 12, 13
Editorial Staff of the BNA, *Administrative Procedure Act: Summary & Analysis* (1946)	6
H. R. Rep. No. 1656, 94th Cong., 2d Sess. *reprinted in* 1976 U.S. Code Cong. & Admin News 6121	5, 10, 13, 17
Moore, The Proposed Administrative Procedure Act, *reprinted in* 92 Cong. Rec., Part 2, 2160 (1946)	6

	Page
S. Rep. No. 996, 94th Cong., 2d Sess. (1976)	5
S. Rep. No. 752, 79th Cong., 1st Sess. (1945)	6
Sovereign Immunity: Hearing Before the Subcommittee of the Judiciary, U.S. Senate, S. 3568, 91st Cong., 2d Sess. (1970)	10, 12, 13, 14, 15, 16, 17

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COMMONWEALTH OF MASSACHUSETTS,

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– against –

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Cross-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

INTEREST OF *AMICUS CURIAE*

New York is one of the largest participants in the Medicaid program, a cooperative federal-state program which provides payments for medical assistance and services for the medically needy. 42 U.S.C. §§ 1396 *et seq.* (1982). Participation by the State entitles it to reimbursement by the federal government for a percentage of the medical costs incurred by qualified recipients.

On occasion, however, the Department of Health and Human Services disallows reimbursement for particular categories of expenditure. With increasing frequency, the effect of these administrative determinations has been to establish federal policy with respect to on-going programs, as well as to withhold specific funds which would otherwise be forthcoming. The impact of these decisions on the benefit level and the nature of the programs available to New York's medically needy is significant. New York submits this brief because of its concern that if this Court does not recognize the jurisdiction of the district courts to hear cases challenging disallowance determinations, the states will be relegated to a forum which cannot provide the complete relief necessary.

SUMMARY OF ARGUMENT

The action brought by Massachusetts in this case seeks to review and set aside a final administrative determination as contrary to the Medicaid statute, Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396q. (1982 & Supp. III 1985). The relief requested is injunctive and declaratory in nature. The issues presented and the way in which they arose are therefore readily, if not classically, comprehended by the Administrative Procedure Act, 5 U.S.C. § 702 *et seq.* (1982 & Supp. IV 1986) ("APA"). If the complaint sought only prospective relief, the application of that statute would not be in issue, and the Secretary of Health and Human Services ("Secretary") concedes as much. Pet. Br. at 15 n.11, 37. However, the Secretary contends that, because a decision favorable to Massachusetts will effectively require payment of money by the federal government, the Tucker Act, 28 U.S.C. § 1491 (1982), is called into play and deprives the district court of jurisdiction to grant any form of relief.

In urging that all actions which include a Tucker Act claim must be brought in the Claims Court, a court which all parties agree cannot provide complete relief, Pet. Br. at 44, 45, the Secretary seeks adoption of a *per se* rule that is contrary to both the language and the purpose of the APA. In addition, because the payment of money lies at the heart of the Medicaid statute and other grant-in-aid programs, adoption of a rule foreclosing district court review in this case would have two far-reaching detrimental effects. It would shift to the Claims Court a broad

range of cases affecting important social policies and programs which historically have not been tried in that court. It would also effectively insulate the officials who administer these programs from the sanctions of specific relief and thereby deprive the states of the means to ensure full compliance by the Secretary with federal law. Indeed, to the extent that the issues addressed by the Secretary in disallowance proceedings overlap with those involved in compliance proceedings which are reviewed by the courts of appeals, the rule proposed by the Secretary would permit him to manipulate jurisdiction for the purpose of avoiding the imposition of specific remedies. Absent clear evidence that Congress intended to accomplish these results, this Court should not deny the district courts jurisdiction to consider claims like those presented by this case. The Secretary has not produced such evidence.[1]

POINT I

THE DISTRICT COURTS HAVE JURISDICTION UNDER 28 U.S.C. § 1331 AND 5 U.S.C. § 702 TO DECIDE CLAIMS FOR PROSPECTIVE RELIEF IN CASES CHALLENGING THE DISALLOWANCE OF FEDERAL FUNDS BY THE GRANT APPEALS BOARD AND TO REQUIRE COMPLIANCE WITH THEIR DECISIONS

Those courts which have considered the question whether district courts may hear disallowance claims have held either that the entire case may be heard, including any claim for monetary relief, *see, e.g., Maryland Dep't of Human Resources v. Dep't of Health and Human Services*, 763 F.2d 1441 (D.C. Cir. 1985); *Michigan Dep't of Social Services v. Secretary of Health and Human Services*, 744 F.2d 32 (6th Cir. 1984); *Connecticut v. Heckler*, 731 F.2d 1052 (2d Cir. 1984), *aff'd*, 472 U.S. 524 (1985); *Oregon Dep't of Human Resources v. Dep't of Health*

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[1] In addition to the arguments set forth below, the State of New York generally endorses the views and opinions expressed by the States of Alabama, Alaska, Arkansas, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Michigan, Oklahoma, Utah, West Virginia, and Wisconsin in their joint *amicus* brief submitted in support of the Commonwealth of Massachussetts.

and Human Services, 727 F.2d 1411 (9th Cir. 1983); *Illinois Dep't of Public Aid v. Schweiker*, 707 F.2d 273 (7th Cir. 1983); *Delaware Division of Social Services v. United States Dep't of Health and Human Services*, 665 F. Supp. 1104 (D. Del. 1987), or, like the court below, that, at least the claim for prospective relief may be decided. *See Minnesota By Noot v. Heckler*, 718 F.2d 852 (8th Cir. 1983).[2] The result reached by these courts is consistent with the presumption that review of agency action belongs in the district courts, which can provide specific relief tailored to the circumstances of each case.

In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1965), this Court characterized the APA as a "seminal act" which "embodies the basic presumption of judicial review" to persons aggrieved by agency action, and is intended to "cover a broad spectrum of administrative actions." 387 U.S. at 140. Accordingly, its " 'generous review provisions' must be given a 'hospitable' interpretation." 387 U.S. at 141 (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)). *See also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (stressing "the strong presumption that Congress intends judicial review of administrative action" under the APA). Congress intended that such review take place in the district courts.

In furtherance of this primary purpose of the APA, Congress, in amending the statute in 1976, sought to remove an artificial barrier to district court review of agency action by eliminating the defense of sovereign immunity. The House and Senate Reports reflect a determination by Congress that:

> *As Government programs grow*, and agency activities continue to pervade every aspect of life, judicial review of the administrative actions of Government officials becomes more and more important. Only if citizens are provided with *access to judicial remedies* against Government officials and agencies will we realize a government truly under law.

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[2] In *Connecticut v. Heckler*, this Court reviewed the validity of a disallowance decision, albeit without addressing the jurisdictional issue.

H.R. Rep. No. 1656, 94th Cong., 2d Sess. 10 *reprinted in* 1976 U.S. Code Cong. & Admin. News 6121, 6130 ("1976 House Report") (emphasis supplied); S. Rep. No. 996, 94th Cong., 2d Sess. 9 (1976). Elimination of the sovereign immunity defense in "all equitable actions for specific relief," 1976 House Report at 9; Senate Report at 8, was seen as an "important step towards this goal." 1976 House Report at 10; Senate Report at 9.

Having sought in the enactment and amendment of the APA to provide "access to judicial remedies" available in the district courts, Congress could not have intended, *sub silentio*, to bar such access in the broad category of cases encompassed by the Secretary's proposed rule. This conclusion is borne out by the structure of the statute, which carefully delineates the conditions limiting its application. Section 702 provides in broad terms that persons injured by "agency action" are "entitled to judicial review thereof." However, the right to judicial review is immediately qualified by specific limitations set forth in the same provision. The action must seek relief "other than money damages." In addition, relief must be denied "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." If Congress had intended to preclude the district courts from granting equitable relief merely because a Tucker Act claim is included in a case, it would have adopted an additional express limitation to this effect. *See Melvin v. Laird*, 365 F. Supp. 511, 518 (E.D.N.Y. 1973) (Weinstein, J.). It did not.

The Secretary's conclusory statement that "the limitations of the APA support the view that Congress has actually forbidden claim splitting," Pet. Br. at 43, is based upon his erroneous assumption that the monetary part of this case must be heard in the Claims Court, coupled with an attempt to show that two of the APA limitations bar prospective relief. The cases in which these provisions have been applied are, for the most part, contract actions and, therefore, except for claims under $10,000, 28 U.S.C. § 1346(a)(2) (1982), not cases which Congress intended the district courts to hear when it amended the APA. *See, e.g., Sharp v. Weinberger*, 798 F.2d 1521, 1523-1524 (D.C. Cir. 1986); *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1485 (9th Cir.),

cert. denied, 474 U.S. 931 (1985). Neither provision affords a basis for ousting the district courts of jurisdiction here.

A. The Claims Court cannot grant the injunctive relief which is necessary in this case. Therefore, the Tucker Act does not provide an adequate remedy that would bar district court review under Section 704 of the APA

Section 704 provides that relief is not available under the APA if an "adequate remedy" exists in another court. The Secretary contends that, although the Claims Court cannot grant injunctive or declaratory relief, Pet. Br. at 44, 45, it can grant relief which is adequate, "[a]t least in the circumstances of this case." The argument is deficient in two respects.

First, the legislative history of the provision, which was part of the statute as originally enacted in 1946, shows that it was a codification of existing law concerning ripeness and exhaustion of administrative remedies. *See* S. Rep. No. 752, 79th Cong. 1st Sess. 38, 44 (1945); Moore, The Proposed Administrative Procedure Act, *reprinted in* 92 Cong. Rec., Part 2, 2160, 2163 (1946). One contemporary finality issue related to the availability of pre-enforcement judicial review of agency action. *See, e.g., United Public Workers* v. *Mitchell*, 330 U.S. 75, 89-93 (1947). Section 704 was "designed" to preclude such review "where there is a subsequent and adequate remedy at law available." Bureau of National Affairs, *Administrative Procedure Act: Summary and Analysis* 34 (1946). Given this limited purpose, section 704 should not be applied to bar APA review where, as here, no issue of finality is presented. *See Commonwealth of Massachusetts* v. *Departmental Grant Appeals Board*, 815 F.2d 778 (1st Cir. 1987). In that case, the Court of Appeals for the First Circuit refused to apply section 704 in similar circumstances because of its reluctance to base "[its] decision concerning district court jurisdiction on a statutory provision which was written with other purposes in mind and whose authority even with regard to those

matters has been substantially qualified by subsequent judicial interpretation." 815 F.2d at 784.[3]

Even if section 704 were applicable in this case, the relief available in the Claims Court is not adequate. The relief which the Secretary posits as a substitute for an injunction and declaratory judgment consists of "a statement of the law that will bind the federal government in its future dealings with the plaintiff" and a remand to the agency with appropriate directions. Pet. Br. at 44. In the same vein, the Secretary asserts that an injunction is unnecessary in this case because "under our system of law, all judicial and administrative decisions stand as precedents for later cases [and] therefore, have some potential future effect." Pet. Br. at 40 n.34.

Notwithstanding the Secretary's assurances that *stare decisis* will protect the state, his record of refusing to follow binding judicial decisions demonstrates the need for the issuance of an enforceable decree. The Secretary's policies of nonacquiescence have been documented in the courts and in the Congress. For example, in *Stieberger* v. *Heckler*, 615 F. Supp. 1315 (S.D.N.Y. 1985), the court held that the nonacquiescence policies employed by the Secretary before and after 1985 were illegal and found it necessary to issue an injunction barring the Secretary, *inter alia*, from denying or terminating social security benefits under policies inconsistent with decisions of the Court of Appeals for the Second Circuit.[4] Indeed, members of this Court have had

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[3] Section 704 has been applied in a small number of cases where finality was not an issue. However, in each case, the court determined that an award of "money damages" by the Claims Court would provide adequate relief. *See, e.g., International Engineering Co.* v. *Richardson*, 512 F.2d 573 (D.C. Cir. 1975), *cert. denied*, 428 U.S. 1048 (1976) (complaint alleged breach of contract and sought injunctive and declaratory relief as well as damages); *Alabama Rival Fire Ins. Co.* v. *Taylor*, 530 F.2d 1221 (5th Cir. 1976) (action to compel specific performance of a contract). This is not such a case.

[4] On appeal, the injunction was vacated based upon representations in another case that the Secretary's policy was in fact consistent with the Court's decisions and would be implemented by appropriate directives. *Stieberger* v. *Bowen*, 801 F.2d 29 (2d Cir. 1986). Nearly a year later, however, the Second Circuit was still seeking evidence that the directives had been issued. *Hidalgo* v. *Bowen*, 822 F.2d 294, 299 (2d Cir. 1987).

occasion to criticize the Secretary's refusal to implement binding decisions of the federal courts. *See Heckler v. Lopez*, 464 U.S. 879, 887 (1983) (Brennan and Marshall, J.J., dissenting). Therefore, although the Secretary has conceded in the past that he is bound by judgments or orders in the *specific* cases in which they are issued, *Stieberger*, 615 F. Supp. at 1342, there is no reason to assume that he will comply as new cases arise.

Speculation about the risk of future disputes is not idle in the context of this case. In at least two Grant Appeals Board cases decided since the decision below, the Board has expressed its disagreement with the First Circuit's interpretation of the law and adhered to at least portions of the agency's original policy. *Utah Dep't of Health*, DGAB Dec. No. 893, August 31, 1987; *Tennessee Dep't of Health and Environment*, DGAB Dec. No. 921, December 2, 1987.[5] Only the issuance of declaratory and injunctive relief, which is not available in the Claims Court, can protect Massachusetts from any future or additional use of the Secretary's erroneous ruling in this case. *See Rowe v. United States*, 633 F.2d 799 (9th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981), in which the court cited the lack of an adequate remedy in the Claims Court as a reason to bifurcate the case.

Adoption of the inflexible rule proposed by the Secretary would have an additional unwarranted result. Under existing procedures, the Secretary determines in the first instance if a dispute should be treated as a disallowance issue under 42 U.S.C. § 1316(d) (1982), or as a compliance issue under 42 U.S.C. § 1396c (1982), and, therefore, subject to review in the circuit courts. 42 U.S.C. § 1316(a)(3) (1982). Disallowances typically involve routine, isolated audit findings affecting a narrow area of reimbursement. *See, e.g., New Jersey v. Dep't of Health & Human Services*, 670 F.2d 1300, 1303 (3d Cir. 1982) (Secretary "merely refused to credit the State for expenses incurred for a limited period of time at a single nursing home").

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[5] Copies of these decisions have been lodged with the Clerk of the Court.

Increasingly, however, as in the instant case, the Secretary has resorted to policy-based disallowances which affect the administration of public benefit programs. These disallowances relate to a wide range of issues and involve substantial amounts of federal financial participation. For example, New York has received decisions disallowing reimbursement under the Medicaid statute for the cost of training related to the development of its Welfare Management System based upon a regulation which changed the reimbursement rate provided by statute. If all such cases must be heard in the Claims Court, as the Secretary contends, by choosing to use the disallowance procedure, the Secretary could avoid the imposition of specific remedies in precisely those cases where they are most important.[6]

The Secretary's characterization of these cases as merely involving "a stream of money over time," Pet. Br. at 44, should not be permitted to obscure the fact that "[w]hat is at stake here is the scope of the Medicaid program, not just how many dollars Massachusetts should have received in any particular year." *Commonwealth of Massachusetts v. Secretary of Health and Human Services*, 816 F.2d 796, 799 (1st Cir. 1987), Pet. App. at 5a. The Secretary has conceded as much in the context of this case. Pet. Br. at 15, n.11, 37. Therefore, this is not a case in which the state has appended a request for specific relief simply as a device to obtain district court review. Pet. Br. at 39.

The Secretary's fear that future plaintiffs will make sham requests for injunctive relief is, in any event, unpersuasive as a reason to deny district court jurisdiction in these cases. The courts are capable of screening out such requests as part of their routine, threshold examination of the jurisdictional issues in particular cases. *See, e.g., Sharp v. Weinberger*, 798 F.2d 1521 (D.C. Cir. 1986) (Scalia, J.); *Hahn v. United States*, 757 F.2d 581, 589 (3d Cir. 1985); *Minnesota By Noot v. Heckler*, 718 F.2d 852, 859, n.12 (8th Cir. 1983).

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[6] This is especially true in circuits which rely upon the Secretary's characterization of the dispute in determining jurisdiction. *See, e.g., Illinois Dep't of Public Aid v. Schweiker*, 707 F.2d 273, 278 (7th Cir. 1983) (adopting Secretary's characterization for purposes of determining the respective jurisdiction of the district courts and court of appeals).

B. The Tucker Act does not impliedly forbid the granting of equitable relief in this case

When it eliminated the defense of sovereign immunity under the APA, Congress also amended section 702 to bar relief where another statute expressly or impliedly bars the award of such relief. The purpose of the provision was to avoid making inadvertent changes in the existing pattern of statutory remedies against the United States, notably the Tucker Act and the Federal Tort Claims Act. 1976 House Report at 13; Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 387, 434-435 (1970) ("Cramton").

In seeking to preserve the pre-existing statutory framework, however, Congress made it equally clear that the proviso "does not withdraw specific relief in any situation in which it is now available." 1976 House Report at 13. The legislative history therefore demonstrates that the proviso was not intended to oust the district courts of jurisdiction to grant specific relief in cases in which they had traditionally asserted their equitable powers.

Grant-in-aid cases were among those specifically recognized by Congress, when it amended section 702, as cases properly brought in the district courts. *Id.* at 9. Congress was aware of the fact that such actions often involve disputes over money, as evidenced by the decisions used to illustrate the grant-in-aid reference in the legislative history. Sovereign Immunity: Hearing Before the Subcommittee on Administrative Practice and Procedure of the Committee of the Judiciary, U.S. Senate, S. 3568, 91st Cong., 2d Sess. 92, 121 (1970) ("1970 Hearing"). *See Lee County School Dist. No. 1 v. Gardner*, 263 F. Supp. 26 (D.S.C. 1967); *Dermott Special School District v. Gardner*, 278 F. Supp. 687 (E.D. Ark. 1968). There is no indication that Congress understood that such cases were subject to review under the Tucker Act in whole or in part. Therefore, the proviso contained in section 702 does not provide a basis for depriving the district courts of jurisdiction in this case.

POINT II

AN ACTION TO SET ASIDE A DISALLOWANCE DETERMINATION OF THE GRANT APPEALS BOARD IS NOT AN ACTION FOR "MONEY DAMAGES" FOR PURPOSES OF THE APA

Section 702 contains a waiver of sovereign immunity for suits in the district courts which challenge agency action and seek "relief other than money damages." The term "money damages" "normally refers to a sum of money used as compensatory relief." *Maryland Dep't of Human Resources v. Dep't of Health and Human Services*, 763 F.2d 1441, 1446 (D.C. Cir. 1985) (Bork, J.). In this case, Massachusetts does not seek compensation for a loss, but the release of funds to which it claims an entitlement under the Medicaid statute. In contrast to an ordinary damage award, a decision favorable to the State will not result in payment of a discrete sum, but merely in a bookkeeping transaction with the federal government.

The Secretary does not deny the difference but, like the Court below, assumes that the term "money damages" as used in section 702 includes *all* forms of monetary relief and therefore bars a state from obtaining district court review in this kind of case. Pet. Br. at 24. As shown below, the legislative history demonstrates that the Secretary's interpretation is incorrect. *Maryland Dep't of Human Resources*, 763 F.2d at 1447.

Those decisions which have given a broad interpretation to section 702 have disregarded the express use of the term "money damages" in the statute. Instead, they have relied upon the apparently interchangeable use of the terms "money damages" and "monetary relief" in the House and Senate Reports accompanying the legislation. *See, e.g, New Mexico v. Regan*, 745 F.2d 1318 (10th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985); *Commonwealth of Massachusetts v. Departmental Grant Appeals Board*, 815 F.2d 778 (1st Cir. 1987). The Court of Appeals for the First Circuit also relied upon an isolated statement from a memorandum upon which the House Report is based which explained that the proposed amendment would eliminate the

defense of sovereign immunity in "all" suits for specific relief and that " '[a]ll forms of monetary relief are excluded from the recommendation.' " *Id.* at 783. *See* 1970 Hearing, 118.[7]

The statements cited by the Court of Appeals for the First Circuit are at best ambiguous.[8] Money damages are only one form of monetary relief. Therefore, absent specific evidence to the contrary, the use of both terms is just as likely to refer only to monetary awards which compensate for injury as to other possible forms of relief involving money. *See* Cramton, 68 Mich. L. Rev. at 434, n.213 (1970) (discussing gaps in the availability of ordinary damages in contract actions under the Tucker Act and tort actions under the Federal Tort Claims Act and using the terms "money damages" and "monetary relief" interchangeably). Given this ambiguity, the juxtaposition of references to specific relief and monetary relief, which the Secretary also relies upon, Pet. Br. at 31, does not constitute such evidence because a monetary award may take the form of a specific remedy.

The District of Columbia Circuit reached exactly this conclusion in holding that the district court has jurisdiction to provide complete relief in a grant-in-aid case. *Maryland Dep't of Human Resources*, 763 F.2d at 1447-1448. The court found that legislative references to monetary relief were equivocal and concluded that "Congress intended to authorize equitable suits for specific monetary relief" as evidenced by the "sweeping declaration" in both the House and Senate Reports that "the time [has] now come to eliminate the sovereign immunity defense in *all equitable actions for specific relief* against a Federal agency."

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[7] The memorandum was prepared by Robert C. Cramton, a Professor at the University of Michigan Law School, who was a consultant to the Administrative Conference of the United States. It was submitted in support of the recommendation made by the Conference in 1970 to amend the APA. The provision recommended at that time is identical to section 702 as amended in 1976.

[8] In summary comments during the 1970 Hearing, Professor Cramton paraphrased the statement cited by the First Circuit and concluded, "Recovery of money damages, however, is excluded from the bill." 1970 Hearing, 31.

763 F.2d at 1447 (emphasis in court's opinion). As further support for this interpretation, the court cited the inclusion in both Reports of cases involving " 'administration of Federal grant-in-aid programs' " as examples of "cases in which the sovereign immunity defense had continued to pose an undesirable bar to consideration of the merits." *Id.*

Although the court recognized that actions brought in the Claims Court under the Tucker Act distinguish between "monetary relief (whether awarded as damages or not) and non-monetary relief, rather than following the more traditional common law distinction between money damages and specific relief (whether involving money or not)," 763 F.2d at 1447, it could find nothing in the legislative history to indicate that the term "money damages" as used in section 702 was intended by Congress as a "shorthand" reference to practice in the Claims Court under the Tucker Act. *Id.*[9] Instead, both the House and Senate Reports focused on the law of sovereign immunity which would be overruled by the proposed legislation, thereby suggesting that "Congress would have understood the recovery of specific monies to be specific relief in this context." The court cited in particular *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949), which distinguished between damage actions and actions for "specific relief," including "the recovery of specific property or monies." *Id.*

The memorandum prepared by Professor Cramton on behalf of the Administrative Conference substantiates the analysis of the District of Columbia Circuit. It examines the law of sovereign immunity as developed by the decisions of this Court beginning with *Larson* and explains that the amendment of section 702 was intended to "eliminate the artificialities, uncertainties and occasional injustices of [this] case law." 1970 Hearing, 117.

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[9] The Secretary disputes this conclusion simply because the legislative history makes frequent references to the Tucker Act. Although these references show that Congress had the Tucker Act "in mind," Pet. Br. at 26, the references are to contract actions for damages and not actions for other forms of monetary relief. *See, e.g.*, 1976 House Report at 12-13; 1970 Hearing, 35, 50, 71. *See* Cramton, 68 Mich. L. Rev. at 435.

One area of uncertainty derived from the statement in *Larson* that an action may be barred by sovereign immunity "if the relief requested . . . will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." 337 U.S. at 691, n.11; 1970 Hearing, 109. The uncertainty concerning whether affirmative relief was available against the sovereign was subsequently reinforced by the decision in *Dugan v. Rank*, 372 U.S. 609 (1963), which "suggest[ed] that sovereign immunity is applicable whenever 'the judgment sought would expend itself upon the public treasury.' " 1970 Hearing, 114. Professor Cramton found, however, that before *Larson*, the courts held that "where a statute imposes a clear duty upon a public officer to pay a claimant, mandatory relief is available in the federal courts." 1970 Hearing, 101.

The cases cited in support of this conclusion directed that money be paid pursuant to a mandatory injunction, *Miguel v. McCarl*, 291 U.S. 442 (1934), or mandamus, *Roberts v. United States*, 176 U.S. 221 (1900).[10] Congress was therefore aware that these remedies were a means of compelling the payment of money when it amended section 702 to eliminate the defense of sovereign immunity in cases seeking specific relief in the form of injunction or mandamus. In these circumstances, the use by Congress of the term "money damages," as distinguished from the more comprehensive term monetary relief, manifests an intention to permit the use of these specific remedies to compel the payment of money under the APA.

Further evidence of this intention is found in the response given by Professor Cramton to the argument that the proposed amendment would vest too much discretion in the judiciary:

> If the fear of improper judicial interference proves warranted, which seems unlikely, it could be met by

[10] Professor Cramton distinguished these cases from those in which the official has discretion to act and there is no "statutory duty owed to the plaintiff." 1970 Hearing, 100. *See Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945).

> a provision restricting temporary or interlocutory relief, pending a decision on the merits, in those situations in which caution is most warranted: *When the action seeks (a) to compel the payment of money by the United States* . . . .

1970 Hearing, 137 (emphasis supplied). The implication that actions seeking specific monetary relief would be available under the APA as amended could hardly be clearer.

In addition, the Cramton memorandum emphasized that the amendment was intended to remove the barrier of sovereign immunity in "suits challenging government regulatory and enforcement activity," 1970 Hearing, 120, including the "[a]dministration of federal grant-in-aid programs." 1970 Hearing, 121. The memorandum cites two decisions which support the District of Columbia Circuit's assumption that this reference included cases in which "[s]pecific relief . . . will . . . often result in the payment of money from the federal treasury," 763 F.2d at 1447, *Lee County School Dist. No. 1 v. Gardner*, 263 F. Supp. 26 (D.S.C. 1967), and *Dermott Special School District v. Gardner*, 278 F. Supp. 687 (E.D. Ark. 1968).

Both were actions to obtain federal funds which had been withheld from state programs and not merely "challenges to federal inaction or regulatory guidelines," as the Secretary suggests. Pet. Br. at 34. For example, in *Lee*, the plaintiffs sought to enjoin federal officials "from discontinuing the payment of federal funds." 263 F. Supp. at 29. The court rejected the defense of sovereign immunity on the ground that the "complaint only requests that the defendants be ordered to cease an allegedly unlawful interference with the flow of funds to which the plaintiffs are already otherwise legally entitled." 263 F. Supp. at 30. The references to the grant-in-aid cases are, therefore, compelling proof that Congress was aware that such cases are routinely brought in the district courts and that the entitlement to federal funds may be addressed by those courts.

The Secretary assumes that because certain advocates in favor of eliminating the defense of sovereign immunity proposed amendments which would have barred all forms of monetary

relief, their views were incorporated in the final amendment. The evidence is to the contrary. An example is the statement submitted by the American Bar Association in support of the amendment, which the Secretary cites as evidence that monetary relief in any form is barred. Pet. Br. at 31. That statement suggests that the proposed amendment applies "only to suits for non-monetary relief" and is intended "to make clear that not only suits for money but also substitutes for suits for money are unaffected by the proposed amendment." 1970 Hearing, 58. The explanation is gratuitous for purposes of section 702 as enacted because it was written in support of a draft amendment prepared by the Administrative Law Section of the ABA in 1969, and not the version of section 702 originally considered by Congress in 1970 and enacted in 1976. American Bar Association, Annual Report, 871 (1969). The 1969 proposal provided:

> The United States may be named as a defendant and a judgment or decree may be entered against the United States irrespective of sovereign immunity, *except that existing law concerning monetary relief or specific relief in lieu thereof shall be unaffected.*

Id. (emphasis supplied). In 1970, when the ABA endorsed the amendment of section 702 prepared by the Administrative Conference, it submitted its 1969 statement, unchanged. 1970 Hearing, 58. Therefore, it is not evidence that Congress, in adopting the limited exception for money damages proposed by the Administrative Conference, intended to exclude all forms of monetary relief from section 702.

The legislative history highlights the reason why Congress used the term "money damages" rather than the broad language proposed by the ABA or by Professor Clark Byse of the Harvard Law School, whose 1962 draft is also cited by the Secretary. Pet. Br. at 29. *See Byse, Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 Harv. L. Rev. 1479, 1528 (1962) (excluded requests for relief which "would compel the disbursement of funds belonging to the United States"). It lies in the fact that, in amending section 702, Congress sought not only to preserve pre-existing statutory remedies but, also, to foreclose the possibility

of exposing the federal government to new damage actions. Thus, Senator Kennedy advised the Senate Judiciary Committee that the "bill does not apply to monetary damages *and will not open the United States to any further liability for such damages.*" 1970 Hearing, 2 (emphasis supplied).

Professor Cramton elaborated on this purpose, stating:

> The creation of new substantive damage claims is not within the sphere of our concern; only a latitudinarian view of "judicial review" would consider monetary relief against the United States, *primarily designed to compensate for harms done*, as part of judicial review of administrative action, which is the subject of § 10 of the APA. However that may be, the language of our proposal, which is applicable in terms only to actions "seeking relief other than money damages," indicates that sovereign immunity remains as a defense to actions seeking monetary relief. *Existing law governing money damages in tort and contract actions is left unchanged.* Thus the exceptions from liability contained in the Federal Tort Claims Act, 28 U.S.C. § 2680, such as the exclusion of most intentional torts and activities involving "a discretionary function," remain unaffected by the Committee's proposal.

1970 Hearing, 139 (emphasis supplied). *See also* 1976 House Report at 20.

The broad interpretation of section 702 urged by the Secretary is therefore contrary to the legislative history which, instead, "supports the proposition that Congress used the term 'money damages' in its ordinary signification of compensatory relief." *Maryland Dep't of Human Resources*, 763 F. 2d at 1447.[11]

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[11] Section 704 does not constitute a barrier to exercise of jurisdiction over the monetary claim for the same reason it is not a bar to granting injunctive relief. The section was intended to prevent pre-enforcement review of agency action.

CONCLUSION

The judgments of the court of appeals should be affirmed in part and reversed in part, and the cases remanded with instructions that the district court had jurisdiction to order complete relief in favor of the State.

Dated: New York, New York
March 31, 1988

Respectfully submitted,

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Nos. 87-712 and 87-929

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

COMMONWEALTH OF MASSACHUSETTS,

Cross-Petitioner,

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Cross-Respondents.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

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QUESTIONS PRESENTED

1. Whether Congress intended, by enacting the 1976 amendments to the Administrative Procedure Act, to deprive the federal district courts of jurisdiction to review Medicaid disallowance disputes.

2. Whether bifurcation of litigation over Medicaid disallowances is required by the interaction of the Administrative Procedure Act and the Tucker Act.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. CONGRESS HAS NOT LEGISLATED TO DEPRIVE THE DISTRICT COURTS OF JURISDICTION TO GRANT COMPLETE RELIEF IN MEDICAID DISALLOWANCE CASES, NOR HAS IT MANIFESTED ANY INTENTION TO DO SO	5
A. The Relief Requested In This Case Is Not Barred By The "Money Damages Exception" To The APA	6
1. *The Commonwealth has not requested money damages*	6
2. *Reimbursement does not constitute money damages*	7
3. *The relief requested here is not "money damages" within the meaning of Section 702 of the APA*	9
B. No Adequate Remedy Is Available In The Claims Court	11
C. The Tucker Act Does Not "Impliedly Forbid" The Relief Sought Here	15
D. The Secretary's Interpretation Of The APA Amendments Contradicts The Essential Purpose Of Those Amendments	17

TABLE OF CONTENTS—Continued

	Page
II. THE DISTRICT COURT IS THE APPROPRIATE TRIBUNAL TO REVIEW MEDICAID DISALLOWANCES	18
III. EVEN IF THE DISTRICT COURT LACKS JURISDICTION TO GRANT COMPLETE RELIEF, IT NONETHELESS HAS JURISDICTION OVER THE COMMONWEALTH'S CLAIMS FOR PROSPECTIVE INJUNCTIVE RELIEF	22
CONCLUSION	26

TABLE OF AUTHORITIES

CASES:	Page
Alabama Rural Fire Insurance Co. v. Naylor, 530 F.2d 1221 (5th Cir. 1976)	14
American Science & Engineering, Inc. v. Califano, 571 F.2d 58 (1st Cir. 1978)	14
Amoco Production Co. v. Hodel, 815 F.2d 352 (5th Cir. 1987), *petition for cert. pending*, No. 87-372	24
Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 454 U.S. 855 (1981)	23
Burlington School Committee v. Department of Education, 471 U.S. 359 (1985)	8, 9
Califano v. Sanders, 430 U.S. 99 (1977)	17, 25
Cannon v. University of Chicago, 441 U.S. 677 (1979)	17
Carter v. Seamans, 411 F.2d 767 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970)	24
Cook v. Arentzen, 582 F.2d 870 (4th Cir. 1978)	24
County of Alameda v. Weinberger, 520 F.2d 344 (9th Cir. 1975)	16
Delaware Division of Health & Social Services v. Department of Health & Human Services, 665 F. Supp. 1104 (D. Del. 1987)	23
Denton v. Schlesinger, 605 F.2d 484 (9th Cir. 1979)	24
Dermott Special School District v. Gardner, 278 F. Supp. 687 (E.D. Ark. 1968)	10, 11
Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978)	24
Giordano v. Roudebush, 617 F.2d 511 (8th Cir. 1980)	24
Glidden Co. v. Zdanok, 370 U.S. 530 (1962)	21
Hahn v. United States, 757 F.2d 581 (3d Cir. 1985)	23, 25
Healy v. Sea Gull Specialty Co., 237 U.S. 479 (1915)	6
International Engineering Co. v. Richardson, 512 F.2d 573 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1048 (1976)	14

TABLE OF AUTHORITIES—Continued

	Page
Keller v. Merit Systems Protection Board, 679 F.2d 220 (11th Cir. 1982)	24
Laguna Hermosa Corp. v. Martin, 643 F.2d 1376 (9th Cir. 1981)	23
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)	17
Lee County School District v. Gardner, 263 F. Supp. 26 (D.S.C. 1967)	10, 11
Maryland Department of Human Resources v. Department of Health & Human Services, 763 F.2d 1441 (D.C. Cir. 1985)	9, 23
Massachusetts v. Department Grant Appeals Board, 815 F.2d 778 (1st Cir. 1987)	14
Matthews v. United States, 810 F.2d 109 (6th Cir. 1987)	24
Megapulse, Inc. v. Lewis, 672 F.2d 959 (D.C. Cir. 1982)	23
Melvin v. Laird, 365 F. Supp. 511 (E.D.N.Y. 1973)	24, 24-25
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982)	17
Minnesota ex rel. Noot v. Heckler, 718 F.2d 852 (8th Cir. 1983)	23
National Association of Counties v. Baker, No. 87-5287 (D.C. Cir. Mar. 11, 1988)	9
New Mexico v. Regan, 745 F.2d 1318 (10th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985)	24
North Side Lumber Co. v. Block, 753 F.2d 1482 (9th Cir.), *cert. denied*, 474 U.S. 931 (1985)	15
Portsmouth Redevelopment & Housing Authority v. Pierce, 706 F.2d 471 (4th Cir.), *cert. denied*, 464 U.S. 960 (1983)	24
Quern v. Jordan, 440 U.S. 332 (1979)	7
Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984), *vacated*, 471 U.S. 1113 (1985)	15
Rowe v. United States, 633 F.2d 799 (9th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981)	23, 25

TABLE OF AUTHORITIES—Continued

	Page
Sharp v. Weinberger, 798 F.2d 1521 (D.C. Cir. 1986)	15, 18
Shaw v. Gwatney, 795 F.2d 1351 (8th Cir. 1986)	23
Spectrum Leasing Corp. v. United States, 764 F.2d 891 (D.C. Cir. 1985)	15
United States v. Mottaz, 476 U.S. 834 (1986)	6, 7
Warner v. Cox, 487 F.2d 1301 (5th Cir. 1974)	14
Wingate v. Harris, 501 F. Supp. 58 (S.D.N.Y. 1980)	14
CONSTITUTIONAL PROVISIONS:	
U.S. Const. Art. III, § 2	22
U.S. Const. Amend. XI	2
STATUTES:	
Administrative Procedure Act, 5 U.S.C. (& Supp. IV) § 551 *et seq.*:	
5 U.S.C. (Supp. IV) § 702	*passim*
5 U.S.C. § 704	5
Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25:	
28 U.S.C. § 1295	19, 20
Social Security Act, Tit. XIX, 42 U.S.C. (& Supp. III) §§ 1396-1396q	*passim*
42 U.S.C. § 1396a	20
42 U.S.C. § 1396b(d)(1)	8
42 U.S.C. § 1396b(d)(5)	8
42 U.S.C. § 1396d(d)(1)	2
Tucker Act:	
28 U.S.C. § 1491(a)(1)	19
28 U.S.C. § 1491(a)(2)	12
28 U.S.C. § 1498(a)	19
28 U.S.C. § 171(a)	19, 21
CONGRESSIONAL MATERIALS:	
S. Rep. No. 275, 97th Cong., 2d Sess. (1981)	19, 20
S. Rep. No. 996, 94th Cong., 2d Sess. (1976)	10, 16
S. Rep. No. 1066, 92d Cong., 2d Sess. (1972)	12, 13

TABLE OF AUTHORITIES—Continued

	Page
H.R. Rep. No. 1023, 92d Cong., 2d Sess. (1972)	12, 13
H.R. Rep. No. 1656, 94th Cong., 2d Sess. (1976)	10, 15, 16, 17
Administrative Procedure Act Amendments of 1976: Hearings on S. 796, S. 797, S. 798, S. 799, S. 800, S. 1210, S. 1289, S. 2407, S. 2408, S. 2715, S. 2792, C. 3123, S. 3296, and S. 3297 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. (1976)	16, 17
Collateral Relief in the Court of Claims: Hearing on H.R. 12979 and H.R. 12392 Before Subcomm. No. 2 of the House Comm. on the Judiciary, 92d Cong., 2d Sess. (1972)	12, 13
Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. (1970)	10, 11, 17, 18
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Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 389 (1970)	18

TABLE OF AUTHORITIES—Continued

The Federalist	Page
No. 45 (J. Madison)	22
No. 46 (J. Madison)	22
No. 78 (A. Hamilton)	22
No. 79 (A. Hamilton)	22
Petrowitz, *Federal Court Reform: The Federal Courts Improvement Act of 1982—And Beyond*, 32 Am. U.L. Rev. 543 (1983)	20
1986 Annual Report of the Director of the Administrative Office of the United States Courts	20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Nos. 87-712 and 87-929

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

COMMONWEALTH OF MASSACHUSETTS,

Cross-Petitioner,

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Cross-Respondents.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

INTEREST OF THE *AMICI CURIAE*

The *amici curiae* are organizations whose members include state, county, and municipal governments and officials throughout the United States. Thus, *amici* have a compelling interest in legal issues that affect state and local governments.

This case presents an important jurisdictional issue affecting a State's claim to federal reimbursement of Medicaid expenses. Medicaid is a cooperative state and federal program which permits participating States to share with the federal government the costs of providing, among other things, "health or rehabilitative services for mentally retarded individuals." 42 U.S.C. § 1396d(d)(1). Here, the Secretary of Health and Human Services ruled that the Commonwealth of Massachusetts was not entitled to reimbursement for certain services provided to handicapped individuals in intermediate care facilities for the mentally retarded. On appeal, the United States District Court for the District of Massachusetts reversed the Secretary's determination. The First Circuit affirmed on the merits, but reversed the monetary judgment entered by the district court in favor of the Commonwealth. The court of appeals concluded that, although the district court was authorized to grant prospective relief, retroactive reimbursement was a money judgment that could be obtained only from the Claims Court.

The jurisdictional issue in this case is a recurring one concerning the appropriate forum for litigating disputes over the interpretation of cooperative grant programs. Almost invariably, a suit to determine the legitimacy of state expenditures under a federal grant program will have monetary consequences, just as declaratory or injunctive relief against a State, which is not barred by the Eleventh Amendment, may impose severe financial costs. Moreover, because the Claims Court has only limited equitable powers, disputes arising under federal grant programs would, in many instances, entail two

lawsuits rather than one if the district courts lacked the power to grant full relief.

A holding that only the Claims Court can determine the scope of a federal grant program would also have serious practical consequences for state and local governments. The district courts have greater familiarity both with state-federal grant programs and with the particular state plans governing the implementation of the Medicaid statute in their particular regions. The district courts also have more experience deciding complex issues of statutory and regulatory interpretation than the Claims Court, which has a specialized expertise. And, just as the district courts have greater expertise than the Claims Court in these matters, so too do the regional courts of appeals have greater expertise than the Federal Circuit. Finally, substantial burdens would be placed upon state and local governments if they were required to litigate in Washington all appeals over grants-in-aid.

Because of the importance of this jurisdictional question to *amici* and their members, *amici* respectfully submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

Amici adopt the statement of respondent and cross-petitioner, the Commonwealth of Massachusetts.

SUMMARY OF ARGUMENT

1. This case presents the question whether the district court is deprived of jurisdiction over all Medicaid disallowance cases which may result in the payment of federal funds to a State. Such a result is neither required by the language of the Administrative Procedure Act ("APA") nor supported by the legislative history of that statute.

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[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

First, the relief that the Commonwealth has requested in this case is not "money damages" within the meaning of the APA. The prayer for relief is prospective; and the only retroactive relief sought is reimbursement, which, as this Court has previously held, does not constitute damages. Second, there is no indication that Congress intended to deprive the district courts of jurisdiction over grant-in-aid litigation when it enacted the 1976 amendments to the APA. The drafters of the amendments used the term "money damages" interchangeably with "contract damages" or "tort damages" and in fact considered grant-in-aid cases to be appropriate for review under the APA.

Moreover, district court review is not precluded by a Tucker Act remedy in the Claims Court. The Claims Court has very limited equitable powers and is unable to offer the prospective injunctive relief required by the Commonwealth in this case. Indeed, the legislative history of both the APA and the Tucker Act shows that Congress never intended that the jurisdiction of the Claims Court should extend to cases like this one. Finally, this Court should not infer that Congress intended to deprive the district courts of jurisdiction over Medicaid disallowances when district court review was available in 1976, at the time the APA amendments were enacted.

2. There are important policy reasons why Medicaid disallowance cases should be decided by the district courts rather than by the Claims Court. The Claims Court has specialized expertise in the areas of government contracts, government employment, and patents. When Congress reorganized the court system to centralize and unify adjudication in these areas, it explicitly disavowed any intent to do so in other areas of substantive law. Grant-in-aid cases are especially appropriate for decision by

regional courts, which are familiar both with the Medicaid statute and with the implementing state plans.

3. Even assuming that the district court lacks jurisdiction to grant relief as to the accrued sums owed to the Commonwealth, the district court nonetheless has jurisdiction to decide the underlying issues of prospective statutory interpretation presented here. The fact that such a decision may form the basis for a subsequent money judgment is not sufficient to deprive the district court of jurisdiction over the prospective claims. It falls to Congress, not this Court, to eliminate whatever inefficiencies of judicial decisionmaking may result from the bifurcation of claims because of the interaction of the APA and the Tucker Act.

ARGUMENT

I. CONGRESS HAS NOT LEGISLATED TO DEPRIVE THE DISTRICT COURTS OF JURISDICTION TO GRANT COMPLETE RELIEF IN MEDICAID DISALLOWANCE CASES, NOR HAS IT MANIFESTED ANY INTENTION TO DO SO.

The Secretary contends that the district court is deprived of jurisdiction in this case by the force of three provisions contained in the 1976 amendments to the APA: (1) the "money damages exception" in Section 702; (2) the proviso in Section 704 that there be "no other adequate remedy in a court"; and (3) the statutory preclusion proviso in Section 702. As we show below, however, the language, legislative history, and underlying purpose of the APA amendments manifest no intent by Congress to divest the district courts of jurisdiction over Medicaid disallowances. Moreover, in the absence of any clear indication of such congressional intent, this Court should not infer that Congress intended to repeal a remedy that was available at the time the APA amendments were enacted.

A. The Relief Requested In This Case Is Not Barred By The "Money Damages Exception" To The APA.

The Secretary's principal argument (Pet. Br. 15-34) against district court jurisdiction in this case rests upon Section 702 of the APA, which provides that "[a]n action in a court of the United States *seeking relief other than money damages*" shall not be dismissed on grounds of sovereign immunity. 5 U.S.C. (Supp. IV) § 702 (emphasis added). The Secretary no longer disputes that the Medicaid statute covered the services the Commonwealth provided to mentally retarded citizens; and he concedes that, if those services are covered, the Medicaid statute mandates reimbursement. (Pet. Br. 17.) However, because the Commonwealth is unwilling to waive recovery of the more than $10 million already improperly withheld by the federal government, the Secretary insists that the district court and the First Circuit had no jurisdiction over this case. (Pet. Br. 15 n.11.)

The Secretary's argument lacks merit for several reasons. First, the Commonwealth did not request the district court to award "money damages." Second, the reimbursement requested by the Commonwealth does not constitute "money damages." Third, there is no evidence that Congress intended, by using the phrase "money damages" in the APA amendments, to oust the district courts of jurisdiction over grant-in-aid litigation.

1. *The Commonwealth has not requested money damages.*

As this Court has recently reaffirmed, in the context of a case where the Government raised the issue of jurisdiction under the Tucker Act, "'[j]urisdiction generally depends upon the case made and relief demanded by the plaintiff.'" *United States v. Mottaz*, 476 U.S. 834, 850 (1986), *quoting Healy v. Sea Gull Specialty Co.*, 237 U.S. 479, 480 (1915) (Holmes, J.). In *Mottaz*, the Indian claimant sought to compel the Government to purchase

from her certain lands that had been transferred previously to the Forest Service. Because the relief sought consisted of payment of the current fair market value of the land, rather than damages equal to compensation for a past taking, this Court held that the case did not fit within the scope of the Tucker Act. 476 U.S. at 838, 850-51.

Under *Mottaz*, analysis of the relief requested in this case must thus begin with the prayer for relief. The Commonwealth asked the district court to:

> 1. Enjoin the Secretary . . . from failing or refusing to reimburse the Commonwealth, or from recovering from the Commonwealth, the federal share of expenditures for medical assistance to eligible residents . . . .
>
> 2. Set aside the Board's Decision . . . .
>
> 3. Grant such declaratory and other relief as the Court deems just.

(Pet. App. 93-94, 98-99.) The Commonwealth's prayer for relief is entirely prospective. Although substantial monetary consequences may flow from a prospective order, that fact does not transform the resulting public expenditures into retroactive damages. *Cf. Quern v. Jordan*, 440 U.S. 332, 337, 347-49 (1979). Moreover, any impact the prospective order will have upon sums past due simply flows from the assumption that the Secretary would reimburse the Commonwealth without the need for a separate suit for collection, once it was determined that the sums had been wrongfully withheld. (See Cross-Pet. 11.) In short, the prayer for relief here does not request "money damages."

2. *Reimbursement does not constitute money damages.*

The superficial similarity between the relief requested here and retroactive damages is simply an accidental by-product of the statutory framework governing the

Medicaid program. Medicaid funds are provided to a State in advance, based on a quarterly estimate of expenditures to be made by the State. 42 U.S.C. § 1396b (d)(1). Subsequently, based on retroactive audits, the Secretary may determine, as he did in this case, that certain state expenditures were not reimbursable under Medicaid and should have been disallowed. 42 U.S.C. § 1396b(d)(5). Before judicial review is available concerning the merits of the Secretary's interpretation of the Medicaid statute, the amounts disallowed are recouped from the federal contributions for succeeding years, although the State is still required to provide all necessary services during those subsequent years.[2] Thus, the Medicaid "account" between a state and the federal government is periodically adjusted on a retroactive basis. Where, as here, there is a dispute regarding the scope of the statute, the federal government is invested with a self-help remedy—recoupment from subsequent federal grants despite the pendency of litigation. Under the statutory scheme, therefore, the State is invariably in the position of seeking to recoup the disallowed funds from the federal government, rather than vice versa.

If, in fact, a decision could be obtained from the administrative and judicial process at the moment of disallowance, prospective injunctive relief would be adequate to prevent the Secretary's wrongful withholding of accrued sums. Thus, as this Court held in *Burlington School Committee v. Department of Education*, 471 U.S. 359, 370-71 (1985), reimbursement in this type of case simply does not constitute "damages." Because the statute contemplates a *post hoc* determination of financial responsibility, reimbursement merely requires the government "to belatedly pay expenses that it should have paid all along." *Id.*

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[2] The State may elect to retain the funds pending a final determination by the Departmental Grant Appeals Board, but must then pay interest on the sums retained if the disallowance is upheld. 42 U.S.C. § 1396b(d)(5).

Based on similar considerations, the District of Columbia Circuit has held that, where a state or local government sues to obtain funds to which it is entitled under a statute, instead of money in compensation for losses suffered from the withholding of those funds, the relief sought is not barred by Section 702 of the APA, even though the court's order may ultimately require payment of money by the federal government. *National Association of Counties v. Baker*, No. 87-5287, slip op. 5-7 (D.C. Cir. Mar. 11, 1988); *Maryland Department of Human Resources v. Department of Health & Human Services*, 763 F.2d 1441, 1446-48 (D.C. Cir. 1985). Thus, the court of appeals has found that neither the reimbursement of Medicaid disallowances nor the disbursement of funds sequestered pursuant to the Gramm-Rudman Act constitutes "money damages" within the meaning of the APA. *Id.*

As in *Burlington School Committee*, *National Association of Counties*, and *Maryland Department of Human Resources*, the reimbursement sought here does not constitute "money damages."

3. *The relief requested here is not "money damages" within the meaning of Section 702 of the APA.*

The legislative history of the APA provides no direct evidence as to the meaning of the phrase "money damages." The precise question before this Court was never raised during the hearings on the 1976 amendments to the APA, when the "money damages exception" was added to the statute. It is clear, however, from the legislative history that the witnesses, drafters, and legislators involved in the 1976 amendments primarily associated the term "money damages" with the traditional notion of damages in contract and tort. For example, when Senator Bumpers introduced the bill, he stated that "[d]amages *in tort or contract* may be available because of statutes waiving the defense, but damages are sometimes not an adequate remedy." 121 Cong. Rec. 29,955 (1975)

(remarks of Sen. Bumpers) (emphasis added). See also *Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970) ("1970 Hearing") at 18 ("Congress has made great strides in establishing—through the Tucker Act and the Federal Tort Claims Act—systems of federal monetary liability for contract and tort") (statement of Roger C. Cramton).

The only evidence to suggest that Congress ever considered the impact of the APA amendments upon the reviewability of grants-in-aid is indirect. As the Secretary has noted (Pet. Br. 32-34), both the House and Senate Reports on the 1976 amendments refer to "administration of Federal grant-in-aid programs" as one area in which the government had been raising the sovereign immunity defense, thus alerting the Committee to the importance of ameliorating the effect of this doctrine. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 6121, 6129; S. Rep. No. 996, 94th Cong., 2d Sess. 8 (1976). At a minimum, one may thus conclude that Professor Cramton, who raised this issue during the 1970 hearing (see 1970 Hearing at 121), and the Committee which gave heed to his advice and included this reference in the official report, believed that sovereign immunity was not an appropriate defense in litigation over grants-in-aid.

Moreover, contrary to the Secretary's reading (Pet. Br. 34), the cases that gave rise to Professor Cramton's concern were cases in which plaintiffs had sought money from the federal government. In *Lee County School District v. Gardner*, 263 F. Supp. 26, 28-30 (D.S.C. 1967), the plaintiff sued to enjoin deferral of payment of federal funds to which the school district was entitled; and in *Dermott Special School District v. Gardner*, 278 F. Supp. 687, 690-92 (E.D. Ark. 1968), the "deferral" amounted

to a withholding of some $80,000 in federal financial assistance.[3] The federal government raised a sovereign immunity defense in both cases. The defense was rejected by both courts, on the ground that the plaintiffs had not sought a positive order directing the payment of funds, but had merely requested that "the defendants be ordered to cease an allegedly unlawful interference with the flow of funds to which the plaintiffs are already otherwise legally entitled." *Lee County*, 263 F. Supp. at 30; *Dermott*, 278 F. Supp. at 691.[4] The relief requested in those cases is remarkably similar to that sought here. (See Pet. App. 93-94, 98-99.)

In sum, there is substantial, if somewhat indirect, evidence that Congress intended district court review to be available in cases involving grant-in-aid programs like that at issue here; and there is no evidence to suggest that Congress intended to deprive the district courts of the authority to grant complete relief in grant-in-aid cases when it enacted the 1976 amendments.

B. No Adequate Remedy Is Available In The Claims Court.

The Secretary also argues that district court review was foreclosed in this case because the Commonwealth has an adequate remedy in the Claims Court. (Pet. Br.

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[3] Federal financial assistance had already been approved in each case and was withheld when the districts failed to comply with subsequently promulgated guidelines.

[4] These cases reflect the tortuous reasoning required prior to the enactment of the 1976 amendments, when it was unclear whether affirmative relief was available against the government. Professor Cramton clearly thought that the necessity for such formulations merely wasted judicial resources before reaching the merits of the case. See 1970 Hearing at 48-50, 98-109.

34-35, 43-44.) However, the Commonwealth seeks injunctive and declaratory relief concerning the Secretary's interpretation and application of the Medicaid statute in the future. (Pet. App. 93-94, 98-99.) This relief, as the Secretary ultimately concedes (Pet. Br. 45), is clearly not available from the Claims Court. Nonetheless, the Secretary suggests that the Claims Court's power to remand the case to the agency will allow the Commonwealth to obtain adequate relief. (Pet. Br. 44.) As the legislative history of the 1972 amendments to the Tucker Act makes clear, however, the Claims Court's limited equitable powers are wholly inadequate to the remedy sought and required by the Commonwealth here.

The Tucker Act was amended in 1972 to grant certain specific and very limited equitable powers to the Court of Claims, specifically, the right to reinstate wrongfully discharged government employees, to place civil and military employees in appropriate duty or retirement status, to correct records, and "to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just." 28 U.S.C. § 1491(a)(2).[5] It is clear from the legislative history that the Claims Court's power to remand cases to the agency is limited to government contract cases in which the record is inadequate for review. See H.R. Rep. No. 1023, 92d Cong., 2d Sess. 4 (1972); S. Rep. No. 1066, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 3118-19; 118 Cong. Rec. 15,010 (1972). This limited power of remand is obviously not an adequate remedy in this case.

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[5] See H.R. Rep. No. 1023, 92d Cong., 2d Sess. 1-7 (1972); S. Rep. No. 1066, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 3116-3121; 118 Cong. Rec. 15,009-10 (1972); *Collateral Relief in the Court of Claims: Hearing on H.R. 12979 and H.R. 12392 Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. (1972) ("1972 Hearing").

Indeed, Congress rejected an earlier version of the 1972 amendments to the Tucker Act because it would have empowered the Court of Claims to "issue such orders and grant such relief as the district courts may issue and grant in civil cases against the United States" (see 1972 Hearing at 2), and therefore could potentially have been interpreted as equating the powers of the Court of Claims with those of the district court. *Id.* at 115-28 (statement of Deputy Assistant Attorney General Jaffe; letter of Deputy Attorney General Kleindienst). The Justice Department objected that this language would create uncertainty about whether the Court of Claims had jurisdiction over a wide range of governmental activities, and would therefore engender additional collateral litigation. See 1972 Hearing at 126-28. In response to this objection, an alternative version was proposed and accepted, to make clear that the amendment did not alter the jurisdiction of the Court of Claims. See H.R. Rep. No. 1023, *supra*, at 2.

In addition, the legislative history of the 1972 amendments is replete with explicit assurances that the amendments were not intended to expand the jurisdiction of the Court of Claims beyond its traditional subjects—government contracts and government disputes with its civilian and military employees. See H.R. Rep. No. 1023, *supra*, at 3 ("the amended bill does not extend the classes of cases over which the Court of Claims has jurisdiction, and it is not intended to confer jurisdiction over any type of case not now included within its jurisdiction"); S. Rep. No. 1066, *supra*, *reprinted in* U.S. Code Cong. & Admin. News 3117; 118 Cong. Rec. 15,010 (1972); 1972 Hearing at 16-17 (statement of Judge Cowen); *id.* at 61 (statement of Thomas H. King). It is therefore not surprising that all of the cases cited by the Secretary to support the proposition that adequate relief may be granted by the Claims Court (Pet. Br. 43 n.38) fall within that court's traditional exclusive jurisdiction over contracts

between the government and private parties. *See American Science & Engineering, Inc. v. Califano*, 571 F.2d 58 (1st Cir. 1978); *Alabama Rural Fire Insurance Co. v. Naylor*, 530 F.2d 1221 (5th Cir. 1976); *International Engineering Co. v. Richardson*, 512 F.2d 573 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1048 (1976); *Warner v. Cox*, 487 F.2d 1301 (5th Cir. 1974). None of these cases involved a dispute between a State and the federal government under a statutory grant-in-aid program.[6]

In sum, the legislative history of the Tucker Act makes clear that the equitable powers of the Claims Court are totally inadequate to provide the relief that the Commonwealth has sought and requires in this case. That legislative history also shows that Congress never anticipated that the Claims Court would be permitted to expand its subject matter jurisdiction beyond the traditional subjects of its jurisdiction, and, in fact, that Congress clearly meant to foreclose that expansion.

In the final analysis, the Secretary would apparently require the Commonwealth to obtain relief from the

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[6] The only cases in which district court review of a grant-in-aid program has been found precluded by the exclusive jurisdiction of the Claims Court have involved unusual circumstances where the court's decision would have no prospective effect at all. For example, *Massachusetts v. Department Grant Appeals Board*, 815 F.2d 778 (1st Cir. 1987), concerned reimbursement for the expense of providing abortions under Medicaid during the pendency of a challenge to the Hyde Amendment: The Commonwealth provided the abortions pursuant to court order during that interim period, but would not do so if the legal challenge failed. Similarly, *Wingate v. Harris*, 501 F. Supp. 58 (S.D.N.Y. 1980), involved reimbursements to nursing homes which had since been decertified. Both of these cases involved expenditures that were discontinued and would not be resumed; therefore the courts' decisions could not have had any prospective effect. Even assuming that those cases were correctly decided, they are very different from the case at hand, where the Commonwealth continues to provide the medical services disallowed by the Secretary.

Claims Court in this or similar cases by means of repeated suits for damages. (Pet. Br. 45 n.41.) Quite obviously, this procedure does not provide an adequate remedy for a State, which requires the certainty available from injunctive and declaratory relief in order to plan and budget expenditures for the future. Repeated lawsuits would also result in a clear waste of public resources, on the part of both litigants and the judiciary. In short, if the district court does not have jurisdiction to grant relief in this case, an adequate remedy is simply not available to the Commonwealth.

C. The Tucker Act Does Not "Impliedly Forbid" The Relief Sought Here.

Finally, the Secretary argues that the district court does not have jurisdiction here because the Tucker Act impliedly forbids the relief sought. (Pet. Br. 44-46.) Again, the cases which the Secretary cites in support of this proposition all involve the Claims Court's well-established exclusive jurisdiction over government contracts and employment. *See Sharp v. Weinberger*, 798 F.2d 1521 (D.C. Cir. 1986); *Spectrum Leasing Corp. v. United States*, 764 F.2d 891 (D.C. Cir. 1985); *North Side Lumber Co. v. Block*, 753 F.2d 1482 (9th Cir.), *cert. denied*, 474 U.S. 931 (1985).[7]

By contrast, the legislative history of the statutory preclusion proviso of Section 702 of the APA demonstrates that Congress did not intend to preclude the relief sought by the Commonwealth in this case. The drafters of the proviso had very specific prohibitions in mind, such as provisions prohibiting injunctive and declaratory relief against the collection of federal taxes. See H.R. Rep. No. 1656, *supra*, at 13, *reprinted in* 1976 U.S. Code

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[7] The Secretary also cites the dissent in *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984), *vacated*, 471 U.S. 1113 (1985). A quite different question was presented there: whether the Tucker Act prohibits specific relief for a taking. 745 F.2d at 1550-56.

Cong. & Admin. News 6133; S. Rep. No. 996, *supra*, at 11; *Administrative Procedure Act Amendments of 1976: Hearings on S. 796, S. 797, S. 798, S. 799, S. 800, S. 1210, S. 1289, S. 2407, S. 2408, S. 2715, S. 2792, C. 3123, S. 3296 and S. 3297 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. (1976) ("1976 Hearings") at 86 (statement of Francis M. Gregory, Jr.). Moreover, when the drafters considered the preclusive effect of the Tucker Act, they were explicitly concerned that the APA not be interpreted to take away the exclusive jurisdiction of the Court of Claims over government contracts or to grant authority to order the specific performance of government contracts. See H.R. Rep. No. 1656, *supra*, at 12-13, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6133.[8] None of these concerns is implicated by the case at hand.

The framers of the statutory preclusion proviso repeatedly emphasized that its purpose was not to withdraw any specific relief that was available, but only to make clear that the APA amendments did not confer new authority where Congress had specified that only certain remedies were available. H.R. Rep. No. 1656, *supra*, at 13, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6133; S. Rep. No. 996, *supra*, at 11-12. In 1976, when the APA amendments were enacted, review of Medicaid disallowances was available in the district courts. *See County of Alameda v. Weinberger*, 520 F.2d 344 (9th Cir. 1975). To imply that the 1976 amendments divested the district courts of this jurisdiction would thus directly

[8] In general, the prohibitions encompassed by the statutory preclusion proviso were prohibitions against types of relief that were not available from the government at all. Here, by contrast, the Secretary does not argue that the Commonwealth is seeking a type of relief that was not previously available. He argues only that the Commonwealth should be required to seek that relief in a different forum.

contradict these congressional assurances, as well as settled principles of statutory construction. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982). *See also Cannon v. University of Chicago*, 441 U.S. 677, 696-99 (1979). In light of Congress' presumed familiarity with a remedy that was already recognized, this Court should not conclude that Congress intended to repeal that remedy, in the absence of a clearly expressed congressional intent to do so.

D. The Secretary's Interpretation Of The APA Amendments Contradicts The Essential Purpose Of Those Amendments.

The Secretary's interpretation of the APA amendments to foreclose review here is not only contradicted by the language and legislative history of the statute, but is contrary to the most central purpose those amendments. As this Court stated in *Califano v. Sanders*, 430 U.S. 99, 104 (1977), "the [APA] statute undoubtedly evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials."

The central concern of the drafters of the 1976 APA amendments was to make clear that affirmative relief was available against the government, even where judicial review had not been provided by statute. See, *e.g.*, 121 Cong. Rec. 29,955-56 (1975) (remarks of Sen. Bumpers); H.R. Rep. No. 1656, *supra*, at 4-5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6124-25; 1976 Hearings at 230-31 (statement of Richard K. Berg). In particular, Congress recognized that it was necessary to dispel confusion arising out of certain statements in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949), to the effect that sovereign immunity was waived only where relief could be had by ordering the cessation of conduct by the government, and not where affirmative action was required. See 1970 Hearing at 98-109. The bill's proponents thus intended to make clear that affirmative relief was available. An explicit goal

was to prevent attorneys for the federal government from repeatedly raising arguments based on sovereign immunity and setting jurisdictional traps for plaintiffs, instead of concentrating their efforts, and those of the judiciary, on the merits of the case. See, *e.g.*, Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 389, 420-23 (1970); 1970 Hearing at 48-50.[9] To prevent this waste of resources, the amendment was to sound a loud and certain trumpet that the government did indeed mean to open itself generally to suits for specific relief arising out of actions by administrative agencies.

In this case, the Commonwealth contests an administrative agency's interpretation of a statute that governs the future relationship between the Commonwealth and the federal government, and the Commonwealth seeks affirmative injunctive relief. In light of all the indications that Congress intended the APA amendments to open the district courts to similar suits, and not to take away any remedy then available, there is no basis for this Court to conclude that the 1976 amendments were intended to divest the district courts of jurisdiction in cases such as this.

II. THE DISTRICT COURT IS THE APPROPRIATE TRIBUNAL TO REVIEW MEDICAID DISALLOWANCES.

The Secretary also argues that a variety of public policy reasons—centralization, uniformity, and efficiency—require that Medicaid disallowance cases be heard

[9] As Justice (then Judge) Scalia observed in *Sharp v. Weinberger*, 798 F.2d 1521, 1522 (D.C. Cir. 1986): "If there is a less profitable expenditure of the time and resources of federal courts and federal litigants than resolving a threshold issue of which particular federal court should have jurisdiction, it does not come readily to mind." Such a waste is particularly obvious in this case because the Secretary did not raise the jurisdictional issue until he had litigated the merits and lost.

in the Claims Court. (Pet. Br. 38-43.) The Secretary's arguments simply obfuscate the vital public policies which are at stake here.

It is true that Congress intended to centralize the decision of certain types of cases when it enacted the Federal Courts Improvement Act ("FCIA").[10] In particular, the legislative history of the FCIA manifests a concern with non-uniformity of decisions and forum-shopping in the highly complex and technical area of patents, which Congress saw as resting upon fact questions in need of special expertise and uniformity of decision. See S. Rep. No. 275, 97th Cong., 2d Sess. 5-7, 39 (1981), *reprinted in* 1982 U.S. Code Cong. & Admin. News 15-17, 48. The legislative history shows an equally strong opposition, however, to centralization and specialization of judicial decisionmaking beyond the limited areas within the traditional jurisdiction of the Court of Claims and the Court of Patent Appeals.[11] Although there had been extensive lobbying efforts to establish a number of specialized courts, as well as a national court of appeals, Congress rejected those efforts and strongly reaffirmed its general commitment to the regional court system. See S. Rep. No. 275, *supra*, at 4, 39-40, *reprinted in* 1982 U.S.

[10] Among other things, the FCIA combined the trial level jurisdictions of the former Court of Claims and the Court of Patent Appeals in the new Claims Court, and centralized all appeals from such cases in the new Court of Appeals for the Federal Circuit. See 28 U.S.C. §§ 1295, 1491(a)(1), 1498(a). The new Claims Court is an Article I court. 28 U.S.C. § 171(a).

[11] In fact, the proponents of the 1976 APA amendments also expressed concern with overcentralization of adjudication. See Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 Harv. L. Rev. 1479, 1494-96 (1962). Professor Byse pointed out that nonstatutory review actions often involve questions of local significance with which local judges are familiar, and that centralization of adjudication in Washington imposes severe burdens and expense upon litigants.

Code Cong. & Admin. News 14, 48-49; see also Petrowitz, *Federal Court Reform: The Federal Courts Improvement Act of 1982—And Beyond*, 32 Am. U.L. Rev. 543, 544-50 (1983). Moreover, the legislative history clearly shows that the FCIA was not intended to expand the subject matter jurisdiction of the former Court of Claims. S. Rep. No. 275, *supra*, at 4, *reprinted in* 1982 U.S. Code Cong. & Admin. News 14.

In light of these strong statements, the Secretary's argument that decision of Medicaid disallowance cases by the district courts somehow contravenes public policy is unconvincing. Cases concerning Medicaid disallowances are particularly appropriate for decision by the regional courts. The statute itself is based on a concept of regionalism, as the Medicaid program is structured around a variety of state plans. 42 U.S.C. § 1396a. The district courts are familiar not only with the Medicaid statute, but also with the intricacies of the particular state plans in their respective States. The expertise of the Claims Court, on the other hand, lies in the areas of government contracts, government employment, patents, and certain tax matters. See, *e.g.*, 1986 Annual Report of the Director of the Administrative Office of the United States Courts 335.[12] The same distinction exists between the regional courts of appeals and the Federal Circuit.

The policy arguments raised by the Secretary concerning bifurcation, or "claim splitting," are similarly inapposite. (Pet. Br. 39-42.) Even if this case were submitted initially to the Claims Court, bifurcation would result because the Claims Court could not give complete relief. Indeed, that scenario would turn the usual order on its head because the State would be required first to

[12] In the court year ended September 30, 1986, for example, the Claims Court disposed of 669 complaints, of which 248 involved government contracts, 165 involved government employment, and 139 involved tax matters. 1986 Annual Report of the Director of the Administrative Office of the United States Courts 335.

seek a judgment for damages before seeking the more comprehensive equitable relief available from the district court. This procedure would also have the untoward result that the collateral estoppel effect of a judgment would run from an Article I court to an Article III court. See 28 U.S.C. § 171(a). On the other hand, if the litigation begins in the district court, the Secretary has it within his own power to avoid a second suit. If the Secretary's interpretation of the statute is approved by the district court, that will end the litigation; if the Secretary loses, he could simply calculate the amounts past due and pay them over to the State.

Finally, the Secretary's arguments in this case threaten to expand the jurisdiction of the Claims Court far beyond its traditional boundaries. Historically, the Claims Court was created as a tribunal to relieve Congress of the pressure caused by numerous private bills. *Glidden Co. v. Zdanok*, 370 U.S. 530, 552-53 (1962); see also P. Bator, P. Mishkin, D. Shapiro, and H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 1326-30 (2d ed. 1973). Although its jurisdiction has been expanded at various times, the Claims Court is still essentially a tribunal for claims against the federal government by private individuals who have contracted with it, have been employed by it, or have been required to turn over their property to it. For reasons having to do with reluctance to tell the sovereign what to do, its remedies have largely been limited to money. This case, however, concerns the relationship between two sovereigns—a State and the federal government—and the Secretary's arguments may be extended to cover disputes arising out of any grant-in-aid program where there is no statutory provision for review.[13]

[13] As other *amici* point out, the federal government has already raised this jurisdictional issue in the context of other statutes and in cases in which the government has been named as a third-party defendant by a State, which has itself been sued by ultimate

The sovereignty of the States was so important to the Framers of the Constitution that cases in which a State is a party may be brought as a matter of original jurisdiction in this Court. U.S. Const. Art. III, § 2. Given the importance that the Framers placed both upon state sovereignty and upon an independent judiciary, the notion that a State could be required to sue the federal government in an Article I tribunal clearly would have astonished the founders. See, *e.g.*, *The Federalist* Nos. 45-46 (J. Madison) and Nos. 78-79 (A. Hamilton). Should the Secretary's argument prevail, a State would presumably be required to decide between bringing suit in the Claims Court or in this Court.

The absurd results which necessarily flow from the Secretary's position cannot have been envisaged by Congress either in drafting the APA amendments or in outlining and expanding the jurisdiction of the Claims Court. This Court should reject the Secretary's interpretation and affirm Congress' intent to open the district courts to challenges to actions by administrative agencies, holding that the district court has jurisdiction over this case and the authority to order complete relief.

III. EVEN IF THE DISTRICT COURT LACKS JURISDICTION TO GRANT COMPLETE RELIEF, IT NONETHELESS HAS JURISDICTION OVER THE COMMONWEALTH'S CLAIMS FOR PROSPECTIVE INJUNCTIVE RELIEF.

Unlike the Court of Appeals, we believe that the district court has jurisdiction to grant complete relief in this case. However, even assuming, for the sake of argument, that the district court lacks authority to order the payment of the accrued sums due to the Commonwealth, the district court nonetheless has jurisdiction over the claims for prospective injunctive relief.

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beneficiaries of a grant-in-aid program; this practice results in the pendency of two separate lawsuits over the same issues. See Brief of Victoria Grimesy, *et al.*, as *amici curiae* in support of the Commonwealth of Massachusetts.

The authority for this proposition is overwhelming. Every federal court to confront this jurisdictional question in the context of a case involving a Medicaid disallowance with any prospective effect has concluded either that the entire case should be decided by the district court or that the district court should decide the nonmonetary claims and transfer to the Claims Court the claim for past sums disallowed. *Maryland Department of Human Resources v. Department of Health & Human Services*, 763 F.2d 1441, 1446-48 (D.C. Cir. 1985) (district court jurisdiction over entire claim); *Minnesota ex rel. Noot v. Heckler*, 718 F.2d 852, 859-60 (8th Cir. 1983) (district court jurisdiction over prospective nonmonetary claims and Claims Court jurisdiction over retroactive monetary claims); *Delaware Division of Health & Social Services v. Department of Health & Human Services*, 665 F. Supp. 1104, 1117 (D. Del. 1987) (district court jurisdiction over entire claim).[14]

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[14] In addition, there is significant precedent in a variety of other contexts to the effect that the district court does not lose jurisdiction over a claim for nonmonetary relief simply because it may form the basis for a subsequent monetary judgment. *Shaw v. Gwatney*, 795 F.2d 1351, 1356 (8th Cir. 1986) (suit for reinstatement and back pay by National Guard officer); *Hahn v. United States*, 757 F.2d 581, 589 (3d Cir. 1985) (suit by participants in national health service scholarship program seeking declaratory, injunctive, and monetary relief from denial of constructive-service credit); *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 971 (D.C. Cir. 1982) (suit by government contractor to enjoin alleged violation of Trade Secrets Act); *Laguna Hermosa Corp. v. Martin*, 643 F.2d 1376, 1379 (9th Cir. 1981) (suit to extend concession agreement); *Rowe v. United States*, 633 F.2d 799, 802 (9th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981) (suit by bidders for oil and gas leases); *Beller v. Middendorf*, 632 F.2d 788, 797-800 (9th Cir. 1980) (Kennedy, J.), *cert. denied*, 454 U.S. 855 (1981) (suit to challenge discharge from Navy of those who engage in homosexual activity);

None of the contrary authority cited by the Secretary involves an ongoing state-federal relationship under a grant-in-aid program, and most of the cases cited involve questions within the Claims Court's traditional jurisdiction over government contracts and employees. *See Portsmouth Redevelopment & Housing Authority v. Pierce*, 706 F.2d 471 (4th Cir.), *cert. denied*, 464 U.S. 960 (1983) (government contract); *Matthews v. United States*, 810 F.2d 109 (6th Cir. 1987) (discharge of air traffic controllers); *Keller v. Merit Systems Protection Board*, 679 F.2d 220 (11th Cir. 1982) (civil service discharge); *Denton v. Schlesinger*, 605 F.2d 484 (9th Cir. 1979) (military discharges); *Cook v. Arentzen*, 582 F.2d 870 (4th Cir. 1978) (military discharge); *Carter v. Seamans*, 411 F.2d 767 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970) (military discharge).[15] In all of these cases, unlike the case at bar, the Claims Court was able to afford an adequate remedy to the plaintiffs.

Although there is some difference of opinion among the circuits on this question, the reasoning of those cases finding that the district court retains jurisdiction over the nonmonetary and prospective claims is persuasive. In *Melvin v. Laird*, for example, Judge Weinstein convincingly demonstrated that the expansion of the powers

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Giordano v. Roudebush, 617 F.2d 511, 514 (8th Cir. 1980) (suit for reinstatement and back pay by physician at veterans' hospital); *Melvin v. Laird*, 365 F. Supp. 511, 516-20 (E.D.N.Y. 1973) (Weinstein, J.) (suit by former army officer seeking declaratory and injunctive relief for alleged deprivation of constitutional rights in court martial). *See also Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978).

[15] Two cases cited by the Secretary involve mineral royalty payments, which, we submit, are more similar to a government contract relationship than to a grant-in-aid relationship. *Amoco Production Co. v. Hodel*, 815 F.2d 352 (5th Cir. 1987), *petition for cert. pending*, No. 87-372; *New Mexico v. Regan*, 745 F.2d 1318 (10th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985).

of the Court of Claims was not intended to oust the district courts of jurisdiction over claims for equitable relief. *See* 365 F. Supp. at 516-20. It would be particularly surprising to infer such an ouster, without any clear expression of congressional intent, when the result would be to oust an Article III court of jurisdiction and force plaintiffs—particularly sovereign States—to bring suit in the Claims Court, an Article I tribunal. *See Hahn v. United States*, 757 F.2d at 590. Finally, a holding that the district court has no jurisdiction over agency review whenever it is coupled with a claim for monetary relief would contradict this Court's statement in *Califano v. Sanders*, 430 U.S. 99 (1977), to the effect that Congress intended judicial review of agency actions to be widely available. *See Rowe v. United States*, 633 F.2d at 802.

Even though bifurcation of claims may be somewhat inconvenient and inefficient, the case law noted above shows that such bifurcation is not unusual. If this Court holds that the APA precludes the district court from granting complete relief, the resulting bifurcation would simply reflect the interaction of the APA and the Tucker Act, and is a matter for legislative, rather than judicial, concern. For these reasons, this Court should hold that the district court had jurisdiction to review this case.

CONCLUSION

The judgment of the court of appeals should be affirmed in part and reversed in part, and the decision of the district court should be affirmed. In the alternative, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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Nos. 87-712 and 87-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS,
Cross-Petitioner,

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE STATES OF ALABAMA, ALASKA, ARKANSAS, CONNECTICUT, HAWAII, ILLINOIS, LOUISIANA, MARYLAND, MICHIGAN, OKLAHOMA, UTAH, WEST VIRGINIA, AND WISCONSIN, AS *AMICI CURIAE* IN SUPPORT OF THE COMMONWEALTH OF MASSACHUSETTS

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QUESTIONS PRESENTED

1. Whether a district court has authority pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, to review a final Medicaid disallowance decision by the Secretary of Health and Human Services and to issue an order requiring prospective compliance with the law.

2. Whether a district court has authority to order adjustment of a state's Medicaid grant account to reflect federal funding for services that had been disallowed by the Secretary.

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	1
INTRODUCTION AND SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. THE DISTRICT COURT HAD AUTHORITY TO REVIEW THE BOARD'S DECISIONS AND TO REQUIRE THE SECRETARY TO APPLY THE CORRECT LEGAL STANDARD IN FUTURE MEDICAID REIMBURSEMENT DETERMINATIONS	9
A. The State's Request For Prospective Relief Is Typical Of Countless Petitions For Review Of Administrative Action For Which Congress Has Waived Sovereign Immunity In Section 702 Of The APA	10
B. The Tucker Act Does Not Provide An "Adequate Remedy" That Would Make The Secretary's Decisions Unreviewable Under Section 704 Of The APA	12
C. The Tucker Act Does Not Override The APA By Requiring Every Action That May Include A Claim For Monetary Relief To Be Brought In The Claims Court	15
1. Nothing in the language or legislative history of the Tucker Act restricts the APA's waiver of sovereign immunity for actions in the district courts	17
2. Ousting the district courts of jurisdiction would increase burdens on litigants and courts	18
3. Collateral estoppel should run from the district courts to the Claims Court	20

TABLE OF CONTENTS—Continued

	Page
II. THE DISTRICT COURT HAD AUTHORITY TO SET ASIDE THE DISALLOWANCES THAT HAD BEEN UPHELD BY THE BOARD	22
A. Petitions For Review Of Disallowance Decisions Often Are Filed Before The Amounts Are Deducted From The Next Quarterly Grant	22
B. Adjustment Of The Running Total In The State's Grant Account Does Not Constitute "Money Damages" That Are Excluded From The Waiver Of Sovereign Immunity In Section 702 Of The APA	24
C. An Order Directing An Official To Disburse Appropriated Funds Does Not Require A Waiver Of Sovereign Immunity	26
CONCLUSION	29

TABLE OF AUTHORITIES

Cases:	Page
Amoco Production Co. v. *Hodel*, 815 F.2d 352 (5th Cir. 1987)	23
Bowen v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986)	10, 22
Bull v. *United States*, 295 U.S. 247 (1935)	25
City of Los Angeles v. *Coleman*, 397 F. Supp. 547 (D.D.C. 1975)	28
City of New York v. *Ruckelshaus*, 358 F. Supp. 669 (D.D.C. 1973), *aff'd sub nom. City of New York* v. *Train*, 494 F.2d 1033 (D.C. Cir. 1974), *aff'd*, 420 U.S. 35 (1975)	28
Connecticut v. *Schweiker*, 684 F.2d 979 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1207 (1983)	19
Connecticut Dep't of Income Maintenance v. *Heckler*, 471 U.S. 524 (1985)	12
Delaware Div. of Health & Social Services v. *United States DHHS*, 665 F. Supp. 1104 (D. Del. 1987), *appeal pending*	21, 26
Dermott Special School Dist. v. *Gardner*, 278 F. Supp. 687 (E.D. Ark. 1968)	11
Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978)	20
Green v. *Mansour*, 474 U.S. 64 (1985)	16
Greene v. *McElroy*, 360 U.S. 474 (1959)	20
Greene v. *United States*, 376 U.S. 149 (1964)	20
Hahn v. *United States*, 757 F.2d 581 (3d Cir. 1985)	20, 21
Healy v. *Sea Gull Specialty Co.*, 237 U.S. 479 (1915)	16
Illinois Dep't of Public Aid v. *Schweiker*, 707 F.2d 273 (7th Cir. 1983)	12
Laguna Hermosa Corp. v. *Martin*, 643 F.2d 1376 (9th Cir. 1981)	20
Lee v. *Thornton*, 420 U.S. 139 (1975)	14, 18
Lee County School Dist. No. 1 v. *Gardner*, 263 F. Supp. 26 (D.S.C. 1967)	11
Maryland Dep't of Human Resources v. *DHHS*, 763 F.2d 1441 (D.C. Cir. 1985)	*passim*
Matthews v. *United States*, 810 F.2d 109 (6th Cir. 1987)	23

TABLE OF AUTHORITIES—Continued

	Page
McKeel v. *Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983), *cert. denied*, 469 U.S. 880 (1984)	16
Melvin v. *Laird*, 365 F. Supp. 511 (E.D.N.Y. 1973)	15, 16, 17
Michigan Dep't of Human Services v. *Secretary of Health & Human Services*, 744 F.2d 32 (6th Cir. 1984)	11
Miguel v. *McCarl*, 291 U.S. 442 (1934)	28
Minnesota ex rel. Noot v. *Heckler*, 718 F.2d 852 (8th Cir. 1983)	19
National Council of Community Mental Health Centers, Inc. v. *Weinberger*, 361 F. Supp. 897 (D.D.C. 1973)	28
New Jersey v. *DHHS*, 670 F.2d 1300 (3d Cir. 1982)	12
Oliveira v. *United States*, 827 F.2d 735 (Fed. Cir. 1987)	21
Oregon Dep't of Human Resources v. *DHHS*, 727 F.2d 1411 (9th Cir. 1983)	12
People ex rel. Bakalis v. *Weinberger*, 368 F. Supp. 721 (N.D. Ill. 1973)	28
Portsmouth Redevelopment & Housing Authority v. *Pierce*, 706 F.2d 471 (4th Cir.), *cert. denied*, 464 U.S. 960 (1983)	27
Richardson v. *Morris*, 409 U.S. 464 (1973)	11, 14, 18
School Committee of the Town of Burlington v. *Department of Education*, 471 U.S. 359 (1985)	25
Smith v. *Jackson*, 246 U.S. 388 (1918)	28
Smith v. *United States*, 654 F.2d 50 (Ct. Cl. 1981)	14, 21
South Corp. v. *United States*, 690 F.2d 1368 (Fed. Cir. 1982)	21
Springdale Convalescent Center v. *Mathews*, 545 F.2d 943 (5th Cir. 1977)	27
State Highway Comm'n v. *Volpe*, 479 F.2d 1099 (8th Cir. 1973)	28
Tennessee ex rel. Leech v. *Dole*, 749 F.2d 331 (6th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985)	23
United States v. *Fausto*, 108 S. Ct. 668 (1988)	24
United States v. *King*, 395 U.S. 1 (1969)	13

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Mendoza*, 464 U.S. 154 (1984)	7
United States v. *Mottaz*, 476 U.S. 834 (1986)	16, 23, 25
United States v. *Testan*, 424 U.S. 392 (1976)	17
Constitution, Statutes and Rules:	
U.S. Const. Art. III, cl. 2	8
Pub. L. No. 92-415, 86 Stat. 652 (1972)	13
Pub. L. No. 94-574, 90 Stat. 2721 (1976)	10
Pub. L. No. 96-499, § 961(a), 94 Stat. 2599 (1980)	23
Pub. L. No. 97-164, § 133, 96 Stat. 25 (1982)	14
5 U.S.C. § 702	*passim*
5 U.S.C. § 704	*passim*
20 U.S.C. §§ 1401 *et seq.*	4
28 U.S.C. § 1295(a)(2) and (3)	24
28 U.S.C. § 1331	*passim*
28 U.S.C. § 1491	13
28 U.S.C. § 1491(a)(1)	15
28 U.S.C. § 1491(a)(3)	14
42 U.S.C. § 1316	7, 24
42 U.S.C. § 1316(d)	2
42 U.S.C. § 1396	27
42 U.S.C. § 1396b(d)	2, 25
42 U.S.C. § 1396b(d)(5)	3, 22
42 U.S.C. § 1396d(d)	4
42 C.F.R. § 441.13(b)	4, 5
45 C.F.R. Part 16	2
45 C.F.R. § 201.15	3
Fed. Cir. R. 18	21
Miscellaneous:	
Collateral Relief in the Court of Claims: Hearing on H.R. 12392 Before Subcomm. No. 2 of the House Comm. on the Judiciary, 92d Cong., 2d Sess. (1972)	13, 14
H.R. Rep. No. 1023, 92d Cong., 2d Sess. (1972)	14, 17
H.R. Rep. No. 1656, 94th Cong., 2d Sess. (1976)	*passim*
H.R. Rep. No. 1167, 96th Cong., 2d Sess. (1980)	23
H.R. Rep. No. 1479, 96th Cong., 2d Sess. (1980)	23
S. 1704, 90th Cong., 2d Sess. (1968)	13

TABLE OF AUTHORITIES—Continued

Page

S. Rep. No. 1066, 92d Cong., 2d Sess. (1972) 14, 17
S. Rep. No. 996, 94th Cong., 2d Sess. (1976) .....*passim*
S. Rep. No. 1465, 90th Cong., 2d Sess. (1968) 13
Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm., 91st Cong., 2d Sess. (1970) .....*passim*

INTEREST OF THE *AMICI CURIAE*

Amici are thirteen states that participate in federal matching fund programs authorized by the Social Security Act, including Medicaid (Title XIX). These states periodically experience disallowances by the Department of Health and Human Services of federal matching funds for these programs, just as the Commonwealth of Massachusetts has experienced in this case. The impact of a disallowance on the nature of state public assistance programs can be substantial. Thus, these states have a vital interest in the determination of the appropriate forum for judicial review of final administrative disallowance actions.

Amici believe that the district courts provide a better setting than the Claims Court for informed judicial review of administrative decisions under federal grant programs such as Medicaid. These exercises in cooperative federalism permit considerable variation among state programs, giving the states needed discretion to meet local needs. Each local district court has the opportunity to become familiar with the individual characteristics of the grant programs in its state, which supply the necessary context for resolving the complex legal issues that arise in disallowance disputes. As a national forum, the Claims Court would be unable to develop the same degree of expertise with respect to the nuances of each state's Medicaid and other grant programs. Accordingly, *amici* urge that the Court implement Congress's intent to authorize judicial review in the district courts under the Administrative Procedure Act.

STATEMENT

1. The Medicaid program is the largest of several cooperative federal-state programs operated under the authority of the Social Security Act to provide medical, financial, and other assistance to needy citizens. Each state develops its own unique assistance programs within the broad framework established by federal law. The programs vary considerably among states with respect

to the nature and extent of the public assistance they provide. Federal funds are made available at prescribed matching rates to reimburse state program expenditures. The complex nature of the programs often requires difficult interpretation of federal criteria in the context of the actual coverage and operation of a specific state's assistance plan.

To participate in the federally-authorized programs, states submit plans that set forth the scope of their programs and other information required by federal law. State plans and the amendments periodically made to them are subject to approval by the Department of Health and Human Services (HHS).

The programs are structured to provide states with the federal share of program costs in advance, in order to encourage states to maintain adequate levels of benefits for their needy beneficiaries. Grants, normally on a quarterly basis, are made to states based on estimates of the federal share of expenses they will incur in the coming quarter. After each quarter, states file reports of their actual expenditures. The actual expenditures are reconciled with the amounts granted pursuant to previous estimates, and the differences (positive or negative) are reflected in the next grants to the state in the particular programs. *See* Pet. App. 2a; 42 U.S.C. § 1396b(d).

Expenditure reports are reviewed by federal officials to determine the allowability of various categories of expenses claimed as the basis for federal funding. If the federal officials believe that a particular claim is not subject to federal matching, it is disallowed. Even if a claim is allowed at the time of expenditure report review, this decision can be reversed upon subsequent audit by federal auditors. There are procedures for administrative review of disallowance actions, culminating in a proceeding before an employee board established by the Secretary, called the Departmental Grant Appeals Board. 42 U.S.C. § 1316(d); 45 C.F.R. Part 16.

When a claim is disallowed, the amount involved is offset from subsequent grants to the state reflecting federal funding for the cost of future state activities in the same program. A state may elect to retain the amount in dispute pending final agency action. Unlike other grant programs, however, under Medicaid the state is subject to an interest obligation for the period between the initial disallowance and the final determination upholding the disallowance if it does elect to hold the disputed funds. 42 U.S.C. § 1396b(d)(5).

Initially, disallowance actions were infrequent and usually resulted from audits. Moreover, they tended to be based upon computational errors or asserted erroneous cost calculations. Federal practices have, however, changed in recent years. It is now common for HHS to issue disallowances upon review of expenditure reports, either immediately or following "deferral" and a request for submission of further documentation by the state. *See* 45 C.F.R. § 201.15. In addition, audit activities, now under the HHS Inspector General, have materially increased.

The nature of disallowances has also changed significantly. Instead of being confined to computational matters, the disallowance has become an important mechanism for determining policy concerning the structure and scope of the assistance programs. The disallowance has become a significant means by which HHS "implement[s] important policies governing ongoing programs." Pet. App. 4a; *see also id.* at 81a-82a ("significant legal questions • • • can arise from disallowances based on audits") (Board decision).

The evolution of the disallowance process is explained to a large extent by the implementation and growth of the Medicaid program since its enactment in 1965. Medicaid is one of the most complex and extensive programs of the federal government. There is a vast body of published and informal regulations setting forth federal program policy and requirements on thousands of sub-

jects. The development of the disallowance process within HHS coincides with the growing utilization and expansion of the Medicaid program in the various states.

2. The present case illustrates how the disallowance process has been used to deal with broad and important policy issues concerning the scope of public assistance programs. The issue is whether Medicaid covers certain categories of services to mentally retarded persons in public institutions designed to help them "achieve some degree of independence and self-care." Pet. App. 2a. Resolution of this issue requires interpretation of section 1905(d) of the Social Security Act, 42 U.S.C. § 1396d(d), which authorizes Medicaid coverage of "health or rehabilitative services" for mentally retarded persons in public institutions, and review of an HHS regulation, 42 C.F.R. § 441.13(b), which prohibits federal reimbursement in these circumstances for "vocational training and educational activities." A decision on the merits also requires understanding the precise nature of the services provided by Massachusetts, as well as the relationship between the Medicaid program and the Education of the Handicapped Act, 20 U.S.C. §§ 1401 *et seq.*, which makes federal funds available for certain special education services if a state provides a specified minimum level of such services.

Following a hearing, the Grant Appeals Board issued two lengthy decisions resolving the legal issues by holding that the services provided to retarded persons by Massachusetts were not within the scope of the Medicaid program. Pet. App. 39a-84a. In accordance with standard procedures, HHS implemented the decisions by deducting the amounts disallowed from future reimbursement grants to the state.

The state sought judicial review in the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1331 and the waiver of sovereign immunity in the Administrative Procedure Act, 5 U.S.C. § 702. *See* Pet. App. 89a-90a, 95a-96a. The state asked

the court to "[s]et aside" the Board's decisions and to issue an injunction prohibiting HHS from refusing to reimburse it for the disallowed expenditures. *Id.* at 93a, 98a. In accordance with HHS policy, the Secretary expressly consented to the jurisdiction of the district court. *See* No. 87-712 Br. in Opp. 6.

On the merits, the district court concluded that the services in question "fall clearly within the category of habilitative services explicitly covered" under the Medicaid statute, and that the state was therefore entitled to federal reimbursement. Pet. App. 26a. The district court entered summary judgment for the state, and it "reversed" the Grant Appeals Board. *Id.* at 32a, 36a. No injunction was entered, nor did the district court order an award of damages.

The court of appeals affirmed in part and vacated and remanded in part. Pet. App. 1a-16a. Acknowledging that the merits presented "a difficult question of statutory interpretation under the Medicaid Act" (*id.* at 1a), the court of appeals agreed with the district court that "the services in question here are reimbursable 'medical assistance,'" and it directed HHS "to develop a Medicaid audit procedure that looks behind * * * [labels] to determine whether services are reimbursable" (*id.* at 16a). The court of appeals further held that the Secretary's interpretation of the regulation at 42 C.F.R. § 441.13(b) to exclude coverage for these services "violates the Medicaid Act." *Id.* at 14a.

With respect to jurisdiction, the court of appeals held that the district court properly entertained the complaints insofar as they constituted a prospective challenge seeking to "define[] the respective roles of the Commonwealth and HHS in a continuing program." Pet. App. 4a. The court noted the significance of prospective relief to the state, since the program in question remains in operation and "the legal issues involved have ramifications that affect other aspects of the Med-

icaid program." *Id.* at 5a. Thus, "[w]hat is at stake here is the scope of the Medicaid program, not just how many dollars Massachusetts should have received in any particular year." *Id.* The court of appeals therefore held that "the district court below had jurisdiction to review the disallowance decision * * * and to grant declaratory and injunctive relief." *Id.* at 6a.

The court of appeals also held, however, that the district court "could not * * * order the Secretary to pay money." Pet. App. 6a. This followed, in the court of appeals' view, from the exclusion of claims for "money damages" from the waiver of sovereign immunity in 5 U.S.C. § 702. The court of appeals expected the Secretary to adjust the running total in the state's reimbursement account to reflect coverage of the disputed services, and it concluded that the state could seek relief in the Claims Court if the Secretary refused to do so. *Id.*

INTRODUCTION AND SUMMARY OF ARGUMENT

By its complaints filed in the district court, Massachusetts sought the usual relief requested and authorized under the Administrative Procedure Act: invalidation of an agency decision and an order requiring the agency to abide by the law. In a radical departure from prior understanding, the Solicitor General argues that the Tucker Act somehow trumps the APA and establishes the Claims Court as the sole tribunal for judicial review in actions that may have monetary consequences for the federal government. The language, legislative history, and policies of the APA and the Tucker Act do not support such a result.

Amici wish to emphasize that district court review of agency action in programs such as Medicaid serves three policies, which should inform the Court's decision in this case. First, Medicaid and other cooperative federal-state programs are not monolithic enterprises that would benefit from centralized national judicial review.[1] The nature and scope of assistance provided by each state are unique —federal law establishes only certain criteria and limitations, leaving states free to choose among many options as required to meet local needs in light of local governmental resources. While federal law is uniform throughout the nation, its application to a particular state's services often can only be determined in light of a thorough understanding of the state's plan and the services it actually provides to beneficiaries.[2] The local federal district courts have developed a familiarity with the unique characteristics of their states' public assistance plans, which a central tribunal such as the Claims Court cannot duplicate.

Second, requiring states and other litigants to seek relief only in the Claims Court, with review in the Federal Circuit, "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984). It also "would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question" and would require the Court "to revise its practice of waiting for a conflict to develop before granting * * * certiorari." *Id.* This Court has in the past been able to wait for circuit conflicts before resolving issues arising out of disallowances; in this very case the Solicitor General did not seek review on the merits

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[1] Congress recognized this by providing for direct review of certain decisions affecting the scope of state Medicaid plans in the regional courts of appeals. *See* 42 U.S.C. § 1316.

[2] This is well-illustrated in the instant case, where the administrative record included exhibits such as a videotape of services provided by the state. *See* Pet. App. 53a n.1. The district court relied on this record in reaching its decision. *Id.* at 18a n.1, 26a. The court of appeals also noted the importance of understanding the character of the services actually provided by the state. *See id.* at 15a-16a.

because "no conflict among the courts of appeals has developed" (Pet. 10-11 n.5).

Finally, as states, *amici* are concerned that they have access to the Article III forum made available under the APA. The Framers provided that certain actions involving states as parties could be resolved by the Article III judiciary, specifically under this Court's original jurisdiction. *See* U.S. Const. Art. III, cl. 2. The spirit of cooperative federalism that animates programs such as Medicaid would best be served by resolving disputes between the federal and state governments before judges enjoying the protections of Article III.

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In point I below, we demonstrate that the potential retrospective impact of the district court's decision did not deprive that court of authority under the APA to issue prospective relief, even if the retrospective impact could be characterized as money damages. The Tucker Act may make the Claims Court the exclusive forum for monetary claims against the United States, but that statute does not require every suit that could be interpreted to include a monetary claim to be brought in the Claims Court, in derogation of the district court's authority under the APA. Equitable relief should be available in the district courts on review of administrative action unless the request for such relief is a sham whose only purpose is to lay the foundation for a money judgment. That is not the case here or in other typical actions for review of the administration of federal grant programs, since declaratory and other prospective orders are necessary to provide complete relief.

The equitable remedies available in the Claims Court were, at the insistence of the Department of Justice, sharply limited as compared to those in the district courts. The Claims Court therefore does not provide an "adequate remedy" that would make review unavailable under the APA. To the extent that a judgment in one

forum might bind the other, it has long been accepted that the district court should bind the Claims Court rather than the other way around.

In point II, we show that the retrospective relief granted Massachusetts was not the sort of claim for money damages that lies outside the APA and solely within the Tucker Act. Petitions for review are often filed before funds are recouped by the federal government, so that the action cannot be characterized as one seeking the return of money held by the government. Moreover, the adjustment of the state's grant account does not resemble a traditional award of money damages that must be sought in the Claims Court. Finally, the impoundment cases make clear that orders, such as the district court's judgments here, requiring the release of appropriated funds can be entered against a federal official by a district court under 28 U.S.C. § 1331 without any waiver of sovereign immunity. The district court therefore was authorized to award complete relief to the state.

ARGUMENT

I. THE DISTRICT COURT HAD AUTHORITY TO REVIEW THE BOARD'S DECISIONS AND TO REQUIRE THE SECRETARY TO APPLY THE CORRECT LEGAL STANDARD IN FUTURE MEDICAID REIMBURSEMENT DETERMINATIONS

The district court held that Massachusetts was entitled to federal financial participation for the disputed services. The Solicitor General acknowledges (Br. 15 n.11, 37) that if only funding for future services were at issue, the district court would have been authorized by the grant of jurisdiction in 28 U.S.C. § 1331 and the waiver of sovereign immunity in 5 U.S.C. § 702 to set aside the agency's decision and to order the Secretary to comply with the law. The fact that funding for services already rendered also was in dispute did not

deprive the district court of its authority to issue prospective equitable relief.[3]

A. The State's Request For Prospective Relief Is Typical Of Countless Petitions For Review Of Administrative Action For Which Congress Has Waived Sovereign Immunity In Section 702 Of The APA

In 1976, Congress amended section 702 of the APA to waive the defense of sovereign immunity "in all equitable actions for specific relief"[4] and amended the general grant of federal question jurisdiction to eliminate the amount-in-controversy requirement for actions against the United States and federal officials. Pub. L. No. 94-574, 90 Stat. 2721 (1976). The primary purpose of these amendments was to provide for "the orderly, rational review of actions of Federal officers" by eliminating the defense of sovereign immunity, with its "wispy fictions" and "doctrinal confusion."[5] In addition, Congress noted that suits for review of agency action "are appropriate matters for the exercise of Federal judicial power,"[6] and it therefore consolidated jurisdiction in the district courts

[3] We assume in this portion of the brief that the court of appeals correctly held that there was a retrospective aspect of the case beyond the district court's authority. As we demonstrate in point II, however, the relief afforded by the district court did not encompass money damages that could be awarded solely under the Tucker Act. If the Court accepts that position, then the district court's jurisdiction over the prospective aspect of the case is clear as well.

[4] H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9 (1976).

[5] S. Rep. No. 996, 94th Cong., 2d Sess. 3, 5 (1976). The Solicitor General's reliance (Br. 16 & n.13) on cases strictly construing other waivers of sovereign immunity is misplaced in view of the remedial purposes of the APA and "the strong presumption that Congress intends judicial review of administrative action" under this statute. Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986).

[6] S. Rep. No. 996, *supra*, at 12.

by eliminating the amount-in-controversy requirement in 28 U.S.C. § 1331.

Congress specifically noted that it intended to waive sovereign immunity for actions challenging the "administration of Federal grant-in-aid programs"[7] such as Medicaid, which "often result in the payment of money from the federal treasury."[8] This Court had already held that such programs could not be challenged under the Tucker Act. *Richardson* v. *Morris*, 409 U.S. 464 (1973) (per curiam). Accordingly, by waiving sovereign immunity in the APA, Congress intended, at the very least, that actions for prospective relief in these cases could be brought in the district courts.

There is nothing unusual about the prospective element of review of Medicaid disallowance decisions. These actions raise the same sorts of legal issues, and contemplate the same sorts of declaratory and other equitable relief, that are grist for the judicial mill under the APA. Courts have consistently held that disallowance decisions are reviewable,[9] and indeed this Court resolved on the

[7] H.R. Rep. No. 1656, *supra*, at 9.

[8] Maryland Dep't of Human Resources v. DHHS, 763 F.2d 1441, 1447 (D.C. Cir. 1985) (Bork, J.). The Solicitor General argues (Br. 33-34 & n.27) that Congress's express intent to provide APA review of federal grant programs should be disregarded because the grant cases of which Congress was aware prior to 1976 did not involve "attempts to secure monetary relief." To the contrary, both of the cases cited by the Solicitor General were actions seeking federal grant funds by challenging the legality of the federal government's withholding of such funds—precisely the basis for the state's claims here. *See* Dermott Special School Dist. v. Gardner, 278 F. Supp. 687, 690 (E.D. Ark. 1968) (plaintiff challenged "withholding of federal financial assistance"); Lee County School Dist. No. 1 v. Gardner, 263 F. Supp. 26, 30 (D.S.C. 1967) (plaintiffs sought order directing federal officials "to cease an allegedly unlawful interference with the flow of funds to which the plaintiffs are already otherwise legally entitled").

[9] *See, e.g.*, Maryland Dep't of Human Resources v. DHHS, 763 F.2d 1441 (D.C. Cir. 1985); Michigan Dep't of Human Services v. Secretary of Health & Human Services, 744 F.2d 32 (6th Cir.

merits a conflict in the circuits arising under the Medicaid program in a suit seeking review of a disallowance decision. *Connecticut Dep't of Income Maintenance* v. *Heckler*, 471 U.S. 524 (1985).

The prospective relief awarded in these cases is precisely the sort intended by Congress when it amended the APA: agency action is set aside, and the responsible officials are directed to comply in the future with the law as declared by the district court. The Secretary recognizes that "significant legal questions • • • can arise from disallowances based on audits." Pet. App. 81a-82a; *see also Connecticut Dep't of Income Maintenance*, 471 U.S. at 528 (resolving "important question of statutory construction" on review of disallowance decision). Congress passed the APA to ensure that persons have access to the district courts for resolution of such questions.

B. The Tucker Act Does Not Provide An "Adequate Remedy" That Would Make The Secretary's Decisions Unreviewable Under Section 704 Of The APA

Notwithstanding the routine nature of the prospective relief sought by the State, the Solicitor General argues (Br. 43-44) that administrative review lies only in the Claims Court in part because an action under the Tucker Act allegedly provides an "adequate remedy" making the Secretary's decisions unreviewable agency action under section 704 of the APA. The Tucker Act remedy, however, is wholly inadequate because the Claims Court cannot provide the declaratory and injunctive relief available in the district court. Review under the APA therefore is not precluded under section 704.[10]

1984); Oregon Dep't of Human Resources v. DHHS, 727 F.2d 1411 (9th Cir. 1983); Illinois Dep't of Public Aid v. Schweiker, 707 F.2d 273 (7th Cir. 1983); New Jersey v. DHHS, 670 F.2d 1300 (3d Cir. 1981).

[10] The Solicitor General's argument that an award of money damages under the Tucker Act provides an adequate remedy under section 704 is inconsistent with his admission (Br. 15 n.11, 37) that wholly prospective challenges (where past funding has been waived) can be brought in the district courts under the APA. If money damages were an adequate remedy, a state could not obtain APA review of a disallowance by waiving past funding. Rather, it would be required to wait for a subsequent disallowance and then to sue for the relevant funds in the Claims Court—a burdensome practice wholly at odds with Congress's intent to provide federal Medicaid funds to the states on a current basis.

Prior to 1972, the Claims Court (formerly the Court of Claims) had no power to enter any sort of equitable relief. *See, e.g., United States* v. *King*, 395 U.S. 1 (1969). The Tucker Act was then amended to give the Court "the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just." Pub. L. No. 92-415, 86 Stat. 652 (1972) (amending 28 U.S.C. § 1491). Congress plainly intended, and the courts have held, that this circumscribed remand power is considerably more limited than the equitable remedies available in the district courts.

In 1968, Congress considered an amendment to the Tucker Act that would have authorized the Court of Claims to grant "such relief as the district courts may issue."[11] This provision would have made "available in Court of Claims cases the full spectrum of judicial remedies."[12] The bill passed the Senate but failed in the House.

The same measure was introduced in 1972. The Justice Department expressed concerns, however, that the bill "is most broad and confers on the Court of Claims all the power and authority a district court possesses in civil litigation."[13] The Department opposed giving the Court of Claims such broad authority "over a wide range of governmental activities" or authorizing persons to

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[11] S. 1704, 90th Cong., 2d Sess. (1968).

[12] S. Rep. No. 1465, 90th Cong., 2d Sess. 4 (1968).

[13] *Collateral Relief in the Court of Claims: Hearings on H.R. 12392 Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. 114 (1972).

"claim all sorts of relief against any agency of the Government." [14] The Department was specifically opposed to giving the Court of Claims the power to issue declaratory judgments, injunctions, and mandamus-type orders.[15]

The Justice Department therefore proposed amending the bill to limit the Court's authority to the remand orders now provided (as well as other orders in personnel actions).[16] With an insignificant change, the bill was reported and enacted in the limited form proposed by the Justice Department.[17]

This legislative history makes plain that Congress intended (and the Justice Department understood) the remand power given the Court of Claims to be considerably more limited than the equitable remedies available in the district courts. Consistent with the legislative history, this Court and the Court of Claims have held since 1972 that the Tucker Act does not authorize permanent or preliminary injunctive relief, declaratory judgments, or writs of mandamus.[18] The limited equitable relief available under the Tucker Act therefore does not constitute an "adequate remedy" that can substitute for relief in

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[14] *Id.* at 121, 123.

[15] *Id.* at 121, 127.

[16] *Id.* at 124.

[17] *See* H.R. Rep. No. 1023, 92d Cong., 2d Sess. 5 (1972).

[18] *See, e.g.*, Lee v. Thornton, 420 U.S. 139 (1975) (per curiam); Richardson v. Morris, 409 U.S. 464 (1973) (per curiam); Smith v. United States, 654 F.2d 50, 53 (Ct. Cl. 1981). In the Federal Courts Improvement Act, Congress for the first time gave the Claims Court authority to enter declaratory judgments, injunctions, and other equitable relief in certain contract cases. *See* Pub. L. No. 97-164, § 133, 96 Stat. 25, 40-41 (1982) (codified at 28 U.S.C. § 1491(a)(3)). Congress's express reference to these remedies and its limitation on the class of cases in which they may be exercised confirm that the Claims Court does not impliedly possess broad equitable powers in other types of cases. *See also* S. Rep. No. 1066, 92d Cong., 2d Sess. 3 (1972) (remand power available only in government contract disputes); H.R. Rep. No. 1023, *supra*, at 4 (same).

the district courts. *See Melvin* v. *Laird*, 365 F. Supp. 511, 520-521 (E.D.N.Y. 1973) (Weinstein, J.).

The limitations on the Claims Court's equitable powers are not merely of theoretical concern. Suits challenging federal administration of grant-in-aid programs often seek detailed injunctions directing future governmental action. Such detail is necessary in view of the complexity of the programs, but it is well beyond the authority of the Claims Court. In addition, preliminary injunctions often are necessary in order to prevent irreparable harm, particularly to individual beneficiaries. Finally, the absence of a prospective declaration of the law could require states and private litigants to return to the Court again and again, each time seeking retrospective funding for discrete time periods, rather than authoritatively resolving the matter in a single suit. In view of these pragmatic concerns, as well as the limitations on equitable relief intended by Congress under the Tucker Act, a suit in the Claims Court cannot be considered an "adequate remedy" within the meaning of section 704 of the APA.

C. The Tucker Act Does Not Override The APA By Requiring Every Action That May Include A Claim For Monetary Relief To Be Brought In The Claims Court

The Tucker Act provides that the Claims Court "shall have jurisdiction to render judgment upon any claim [for money damages] against the United States." 28 U.S.C. § 1491(a)(1). The Solicitor General would read this provision to mean that the Claims Court "shall have *sole* jurisdiction to render judgment upon any suit that *includes* a claim for money damages against the United States." Such an interpretation is not only at odds with the language of section 1491, it is directly contrary to the legislative history of the Tucker Act.

There is no significant claims-splitting problem that requires twisting the statutory language to vest exclusive jurisdiction over suits for prospective and monetary

relief in the Claims Court. Rather, the position urged by the Solicitor General would increase the burdens of duplicative litigation in different forums. Moreover, courts—including the Court of Claims—have recognized that if claims must be split, the prospective elements should be adjudicated first, so that collateral estoppel will run from the Article III district court to the Article I Claims Court, rather than the other way around.

No inquiry into the "primary purpose" of the complaint or the "substantial effect" of the judgment is necessary to protect the role of the Claims Court. Litigants should be barred from seeking initial equitable relief in the district courts only where "[t]he *only* value to [plaintiffs] of the declaratory judgment [or other equitable relief] they seek would be to have it serve as res judicata in the Claims Court." *McKeel* v. *Islamic Republic of Iran*, 722 F.2d 582, 590-591 (9th Cir. 1983), *cert. denied*, 469 U.S. 880 (1974) (emphasis added); *accord Melvin* v. *Laird*, 365 F. Supp. 511, 520 (E.D.N.Y. 1973).[19] This rule ensures that the jurisdiction of the Claims Court will not be evaded by artful pleading, yet allows the plaintiff to be " 'absolute master of what jurisdiction he will appeal to;' "[20] avoids fruitless inquiries into purpose and effect; and gives full force to the policies that impelled Congress to authorize suits for judicial review of administrative action in the district courts under the APA.

[19] *Cf.* Green v. Mansour, 474 U.S. 64, 73 n.2 (1985) (suit seeking declaratory judgment barred by Eleventh Amendment where "the declaratory judgment would serve no purpose" other than as a basis for an award of damages in state court).

[20] United States v. Mottaz, 476 U.S. 834, 850 (1986), *quoting* Healy v. Sea Gull Specialty Co., 237 U.S. 479, 480 (1915) (Holmes, J.).

1. *Nothing in the language or legislative history of the Tucker Act restricts the APA's waiver of sovereign immunity for actions in the district courts*

As noted above, the language of the Tucker Act does not support the position that the Claims Court has exclusive jurisdiction—in derogation of the presumption of reviewability under the APA—of any suit that seeks both prospective and retrospective relief. This is confirmed by an examination of the 1972 amendments to the Tucker Act, which for the first time gave the Court of Claims limited equitable powers (*see* pages 13-14, *supra*). Prior to that time, persons seeking both equitable and monetary relief were generally required to bring separate actions in the Court of Claims and in the district court. The additional authority granted the Court of Claims in 1972 allowed some actions to be brought entirely in that forum, but it was not intended, *sub silentio*, to restrict the powers of the district court. As explained by Judge Weinstein:

> "The legislative history of the 1972 amendment makes manifest that the motivation for its enactment was a Congressional desire to respond to the need of the Court of Claims to implement its monetary judgments with collateral equitable relief, so that litigants, *if they so desired*, would be able to obtain complete relief in the Court of Claims. The legislative background, however, leaves little doubt that the added powers of the Court of Claims to grant incidental relief were in no way intended to oust the jurisdiction of the district courts to act pursuant to its mandamus and declaratory judgment powers."

Melvin v. *Laird*, 365 F. Supp. 511, 518 (E.D.N.Y. 1973) (emphasis in original).

This view is confirmed by the legislative history, which makes clear that Congress did not intend in 1972 to expand the jurisdiction of the Court of Claims.[21] The Court

[21] *See* S. Rep. No. 1066, *supra*, at 1; H.R. Rep. No. 1023, *supra*, at 3; United States v. Testan, 424 U.S. 392, 404 n.7 (1976).

of Claims was not authorized before 1972 to be a central forum for review of administrative action, and nothing in the 1972 amendment changed that. *See Richardson* v. *Morris*, 409 U.S. 464 (1973) (per curiam) (Tucker Act did not authorize suit for declaratory relief under the Social Security Act); *Lee* v. *Thornton*, 420 U.S. 139 (1975) (per curiam) (Tucker Act did not authorize suit seeking return of money and declaratory relief under the customs laws).

If Congress had believed that the Court of Claims already had jurisdiction to hear routine administrative review actions, the 1976 amendments to the APA waiving the defense of sovereign immunity for actions in the district courts would have been unnecessary. The record shows, however, that no one contended that these actions—such as suits for review of federal grant programs—could already be heard under the Tucker Act; rather, Congress waived sovereign immunity in the APA to ensure that they could be heard in the district courts.[22] Congress intended that contract actions and other claims for which the Tucker Act provided an exclusive remedy could not be brought under the APA, but there is no indication that it thought that suits such as the present one fell into that category.[23]

2. *Ousting the district courts of jurisdiction would increase burdens on litigants and courts*

The Solicitor General argues (Br. 39-42) that vesting exclusive jurisdiction in the Claims Court is necessary to avoid claims-splitting and duplicative litigation. In fact,

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[22] *See* S. Rep. No. 996, *supra*, at 5-10; H.R. Rep. No. 1656, *supra*, at 4-11.

[23] *See* S. Rep. No. 996, *supra*, at 11-12; H.R. Rep. No. 1656, *supra*, at 12-13. The Solicitor General's argument (Br. 44-46) that the Tucker Act "impliedly forbids" suits for administrative review under the APA is therefore incorrect. *See also* pages 12-13 note 10, *supra*.

such exclusive jurisdiction would produce exactly the opposite result.[24]

As a practical matter, the rule established by the court of appeals would not require a litigant to bring two lawsuits. In the usual case, the government ought to be expected voluntarily to obey the law as declared by the district court and to continue funding as necessary to conform to that law. Only when government officials fail to obey the law would a second action be necessary. *See* Pet. App. 6a; *Minnesota ex rel. Noot* v. *Heckler*, 718 F.2d 852, 860 n.14 (8th Cir. 1983).[25] Thus, there is at present no burden that must somehow be alleviated by interpreting the Tucker Act to restrict the APA.

Such an interpretation would create precisely the burdens that the Solicitor General seeks to avoid. In addition to actions by states for review of disallowances, suits raising issues of federal Medicaid law often are brought by beneficiaries against their state agencies. The state may then seek to implead the federal government as a third-party defendant, so that all issues may be resolved in a single action in federal district court. Under the Solicitor General's interpretation, that would no longer be possible. The claims of beneficiaries against the state cannot be decided in the Claims Court, and related claims of the state against the federal government could not be decided in the district court. Since the federal government was not a party to the district court action, it presumably would be free to relitigat the issues in the

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[24] The Solicitor General also erroneously argues (Br. 42) that district court jurisdiction would lead to forum shopping. States and other litigants, however, have preferred to seek review of administrative action in the local Article III district courts rather than in the Article I Claims Court. Upholding district court jurisdiction in this case would not change this practice.

[25] Even if federal officials did not obey the law, the state would not be required to go to the Claims Court, since the district courts retain jurisdiction to order officials to disburse appropriated funds. *See* Connecticut v. Schweiker, 684 F.2d 79 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1207 (1983); pages 26-28, *infra*.

Claims Court. There is no indication that Congress intended to require such a burdensome practice.

3. *Collateral estoppel should run from the district courts to the Claims Court*

It may be that the nature of suits seeking both prospective and retrospective relief—a possibility not considered by Congress[26]—requires in some instances that either the Claims Court be bound by a prior adjudication in the district court, or the district court be bound by a determination in the Claims Court.[27] The courts have consistently held in these circumstances that it is appropriate to resolve the district court action first, and for the Claims Court to adhere to the law as declared by the district court.[28] This does not make the Claims Court a "mere paymaster"—it simply recognizes the primary role of the district courts in reviewing the legality of administrative action under the APA, leaving to the Claims Court those areas, such as government contracts, where Congress intended that tribunal to be preeminent.

As one court of appeals has stated, there is "no threat to Claims Court jurisdiction in the fact that collateral estoppel may require the Claims Court to adhere to a district court determination of the lawfulness of government conduct." *Hahn* v. *United States*, 757 F.2d 581, 589

[26] *See, e.g., Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm.*, 91st Cong., 2d Sess. 58 (1970) ("All suits seek either monetary or non-monetary relief.") [hereinafter cited as *Sovereign Immunity Hearing*].

[27] As we demonstrate below, this is not such a case because the district court was authorized to grant complete relief.

[28] *See, e.g.*, Hahn v. United States, 757 F.2d 581, 589 (2d Cir. 1985); Laguna Hermosa Corp. v. Martin, 643 F.2d 1376, 1379 (9th Cir. 1981). *See also* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 71 n.15 (1978); Greene v. McElroy, 360 U.S. 474 (1959) (initial suit in district court for injunctive relief in personnel action); Greene v. United States, 376 U.S. 149 (1964) (subsequent suit in Court of Claims for monetary relief).

(3d Cir. 1985). The Court of Claims agreed with this analysis: the district court should have "a free hand to render judgment on the * * * nonmonetary claims, * * * [even when] the district court cannot grant relief on the [monetary] claims." *Smith* v. *United States*, 654 F.2d 50, 52 (Ct. Cl. 1981). Following such a judgment, the Court of Claims stated, the plaintiff may "come to our court armed with whatever collateral estoppel effects the district court decision would have." *Id.*[29]

This order of decision serves two related policy considerations. First, it makes more sense to bind the Article I Claims Court to determinations made by the Article III district courts than for the Article I tribunal to control the Article III forum. *See, e.g., Hahn* v. *United States*, 757 F.2d at 590. Second, "the policies of the APA take precedence over the purposes of the Tucker Act." *Delaware Div. of Health & Social Services* v. *United States DHHS*, 665 F. Supp. 1104, 1117 (D. Del. 1987), *appeal pending*. Congress waived sovereign immunity under the APA in order to make review of administrative action broadly available in the district courts. It would conflict with that policy to prevent the district courts from exercising their review function and awarding prospective relief merely because retrospective relief might also eventually be awarded in the Claims Court. The important role of judicial review in ensuring the evenhanded administration of justice and in legitimiz-

[29] The decisions of the Court of Claims were adopted as binding precedent by the Federal Circuit. South Corp. v. United States, 690 F.2d 1368, 1370-1371 (Fed. Cir. 1982) (en banc). Contrary to the Solicitor General's contention (Br. 36-37 n.29), the decision in Oliveira v. United States, 827 F.2d 735 (Fed. Cir. 1987), does not cast doubt on the continued vitality of *Smith*. The issue in *Oliveira* was the propriety of an award of attorney's fees; the language quoted by the Solicitor General described an unpublished ruling on an earlier appeal, which lacks any precedential value. *See* Fed. Cir. R. 18.

ing the function of administrative agencies[30] counsels strongly in favor of independent review by the Article III judiciary rather than review by untenured Article I officials. *See also* pages 6-8, *supra*.

II. THE DISTRICT COURT HAD AUTHORITY TO SET ASIDE THE DISALLOWANCES THAT HAD BEEN UPHELD BY THE BOARD

In addition to declaring the law and ordering prospective relief, the district court had the power to provide retrospective relief with respect to the particular disallowances at issue. Disallowances often are not recouped by the Secretary before actions for review are filed. Where this is the case, there can be no argument that the petition for review seeks an order requiring the payment of federal funds. Even where the funds are recouped prior to initiation of the action, an order setting aside a disallowance merely requires an adjustment in the running grant account between the state and the Secretary, not the payment of "money damages" within the meaning of the APA. Finally, no waiver of sovereign immunity is required to grant such retrospective relief because Medicaid funds have already been appropriated by Congress for the purpose of paying the federal share of eligible state program expenditures.

A. Petitions For Review Of Disallowance Decisions Often Are Filed Before The Amounts Are Deducted From The Next Quarterly Grant

States are permitted to retain funds that have been disallowed on audit pending a final decision by the Grant Appeals Board. *See* 42 U.S.C. § 1396b(d)(5). If the Board upholds the disallowance and the funds were previously drawn by the state, the Secretary recoups the funds by reducing the amount of a subsequent quarterly grant. *Id.* Although it did not occur in this case,

[30] *See, e.g.*, Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670-672 & n.3 (1986); S. Rep. No. 996, *supra*, at 4; *Sovereign Immunity Hearing*, *supra*, at 45.

the state typically can institute an action for judicial review of the disallowance decision before this recoupment takes place.

In these circumstances, "[t]he state [is] not seeking to have the federal government pay out any more money, but only trying to retain money that had already been paid to the state by the United States." *Matthews* v. *United States*, 810 F.2d 109, 112 (6th Cir. 1987). Since the state is not seeking "damages for the Government's *past* acts" but an injunction against future acts, the Tucker Act has no application. *United States* v. *Mottaz*, 476 U.S. 834, 851 (1986) (emphasis added); *see Amoco Production Co.* v. *Hodel*, 815 F.2d 352, 361 n.10 (5th Cir. 1987); *Tennessee ex rel. Leech* v. *Dole*, 749 F.2d 331 (6th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985). The district court therefore plainly has jurisdiction in these types of cases.[31]

There is no basis for treating the case any differently where the state elects not to retain the funds or where adjustment to the grant account otherwise takes place before the lawsuit is filed. No policy underlying the Tucker Act or sovereign immunity in general requires that such a case be brought in the Claims Court when the analogous pre-recoupment action is under the jurisdiction of the district court. Congress intended no such distinction when it changed the Medicaid law to require states to pay interest on retained funds and thereby encouraged them to allow the Secretary to adjust the grant account before final action by the Board.[32]

In addition, certain decisions of the Secretary concerning the scope of state Medicaid programs are reviewable

[31] District court jurisdiction would not be defeated by later recoupment, for two reasons. First, jurisdiction should be determined at the time of filing. Second, the state could obtain a preliminary injunction against recoupment in order to protect the district court's jurisdiction.

[32] *See* Pub. L. No. 96-499, § 961(a), 94 Stat. 2599, 2650 (1980); H.R. Rep. No. 1167, 96th Cong., 2d Sess. 90 (1980); H.R. Conf. Rep. No. 1479, 96th Cong., 2d Sess. 153 (1980).

directly in the regional courts of appeals, even where substantial federal funds are at stake. *See* 42 U.S.C. § 1316. There is no reason to take disallowance decisions—which raise similar substantial legal issues under the same laws—out of the district courts, with review in the same regional courts of appeals.[33]

B. Adjustment Of The Running Total In The State's Grant Account Does Not Constitute "Money Damages" That Are Excluded From The Waiver Of Sovereign Immunity In Section 702 Of The APA

The Solicitor General argues (Br. 21-34) that an order requiring the Secretary to adjust the state's grant account to restore federal financial participation for improperly disallowed funds constitutes "money damages" for which there is no waiver of sovereign immunity under the APA. This argument misapprehends the operation of federal grant programs as well as the scope of the limited exception intended by Congress in its reference to "money damages" in section 702 of the APA.[34]

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[33] Tucker Act cases are reviewable exclusively in the Federal Circuit. *See* 28 U.S.C. § 1295(a)(2) and (3); United States v. Fausto, 108 S. Ct. 668, 675 (1988).

[34] The Solicitor General also argues (Br. 34-35) that the request for retrospective relief falls outside the APA because the Tucker Act provides an "adequate remedy." The Tucker Act does not provide an adequate remedy for two reasons. First, it does not permit the plaintiff to obtain equitable relief in addition to monetary relief in a single action, which is particularly important in actions with prospective as well as retrospective effects. Second, while relief may be available in the Claims Court, any remedy under the Tucker Act in these circumstances is far from clear. *See* Maryland Dep't of Human Resources v. DHHS, 763 F.2d 1441, 1448-1451 (D.C. Cir. 1985). The federal government's argument in favor of its own liability under the Tucker Act (Br. 17 & n.14, 37, 44) is a telling indication of the unusual nature of its position in this case. Finally, whether or not the Tucker Act provides an adequate remedy for purposes of the APA, the retrospective aspect of the state's case may be maintained under 28 U.S.C. § 1331 even if it is outside the APA because Medicaid funds have already been appropriated. *See* pages 26-28, *infra*.

Federal funding for programs such as Medicaid is provided through quarterly advance "reimbursement" to the states based on estimates of future covered expenses, adjusted by the shortfall or excess of federal funding for actual state activities in prior quarters. *See* 42 U.S.C. § 1396b(d). An order reversing a disallowance decision does not have the effect of requiring the federal government to pay a discrete sum of money to the state; rather, the running total in the state's account is simply adjusted to reflect coverage of the activities in question. This does not come within the general understanding of "money damages."[35] It is instead more like a set-off, which has long been held not to require a waiver of sovereign immunity. *See, e.g., Bull* v. *United States*, 295 U.S. 247, 261-262 (1935).

Also unlike traditional money damages, adjustment of the grant account does not constitute compensatory relief substituting for a loss. To the contrary, it is better understood as specific relief requiring the return to the state of what was improperly taken by the federal government:

> "The fact that in the present case it is money rather than in-kind benefits that pass from the federal government to the states (and then, in the form of services, to program beneficiaries) cannot transform the nature of the relief sought—specific relief, not relief in the form of damages."

Maryland Dep't of Human Resources v. *DHHS*, 763 F.2d 1441, 1446 (D.C. Cir. 1985) (Bork, J.). This Court has elsewhere rejected arguments by the federal government that any action seeking the payment of money by the federal government falls exclusively within the Tucker Act, *United States* v. *Mottaz*, 476 U.S. 834, 850-851 (1986), and the same result should follow here.

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[35] *Cf.* School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359, 370-371 (1985) (local reimbursement under the Education of the Handicapped Act is not "damages" but "merely requires the Town to belatedly pay expenses that it should have paid all along").

The legislative history of section 702 of the APA confirms that Congress intended to limit the exception for "money damages" to traditional compensatory relief. *See Maryland Dep't of Human Resources*, 763 F.2d at 1447. This exception was understood to encompass relief "designed to compensate for harms done" rather than to except any order requiring the payment of money by the federal government.[36] As discussed above (page 11), Congress was aware that many actions for judicial review under the APA could result in monetary payments by the government, but it did not broadly exempt such actions from the waiver of sovereign immunity in section 702. The term "money damages" would not have been chosen to implement such an exemption. Rather, it appears that Congress merely intended to ensure that litigants could not use the APA to escape the limitations on the recovery of damages as traditional compensatory relief in contract and tort actions under the Tucker Act and the Federal Tort Claims Act.[37] Such actions bear no resemblance to a suit for judicial review of administrative action. *See Delaware Div. of Health and Social Services* v. *United States DHHS*, 665 F. Supp. 1104, 1117 (D. Del. 1987) (suit for judicial review is not a "claim against the United States" within the Tucker Act), *appeal pending*.

C. An Order Directing An Official To Disburse Appropriated Funds Does Not Require A Waiver Of Sovereign Immunity

Even if this suit were not within section 702 of the APA, it could be maintained under the general federal question jurisdiction of 28 U.S.C. § 1331 without any waiver of sovereign immunity. Where, as here, a suit seeks the release of funds already appropriated by Congress, the suit may be brought against a federal agency

[36] *See Sovereign Immunity Hearing*, *supra*, at 139.

[37] *See id.* ("Existing law governing money damages in tort and contract actions is left unchanged.").

or official without transforming it into one against the United States that might be barred by sovereign immunity.

Congress has authorized to be appropriated, and has appropriated, such sums as are necessary to carry out the purposes of the Medicaid program. *See* 42 U.S.C. § 1396. "The sums made available under this section shall be used for making payments to States" for activities performed under approved state Medicaid plans. *Id.* Under these circumstances, no waiver of sovereign immunity is necessary for an order requiring payment of federal funds for eligible services, because Congress has already directed that such funds be made available. For example, in an action seeking to compel federal Medicaid reimbursement for certain activities, a court of appeals reasoned as follows:

> "[Plaintiff] merely seeks funds • • • that the Congress has already appropriated for disbursal under the Medicaid Program rather than any monies which the Secretary would be compelled to expend from the United States Treasury without the Federal Government's consent. In appropriating these funds Congress has directed that they be used by the Secretary to fulfill his statutory obligations and achieve the declared purposes of the Medicaid Act. An action to compel a federal officer to distribute an annual appropriation made by Congress, as here, is not barred by sovereign immunity."

Springdale Convalescent Center v. *Mathews*, 545 F.2d 943, 950 (5th Cir. 1977).[38]

This rule was applied in several impoundment cases in the early 1970s, which were brought directly under section 1331 before the amendment of the APA in 1976. In these cases, the courts held that an injunction requiring the release of appropriated funds was not barred by

[38] *But cf.* Portsmouth Redevelopment & Housing Authority v. Pierce, 706 F.2d 471, 473-474 (4th Cir.), *cert. denied*, 464 U.S. 960 (1983).

sovereign immunity because such relief "would go no further than to require the spending of funds already appropriated by Congress to achieve the declared purposes of the Act." *National Council of Community Mental Health Centers, Inc.* v. *Weinberger*, 361 F. Supp. 897, 900 (D.D.C. 1973); *accord State Highway Comm'n* v. *Volpe*, 479 F.2d 1099, 1123 (8th Cir. 1973) ("The resultant release of funds is only to the extent that Congress has already authorized them to be appropriated and expended.").[39]

This Court has similarly rejected the defense of sovereign immunity in cases brought to enjoin government officials from interfering with the payment of federal benefits. In *Miguel* v. *McCarl*, 291 U.S. 442 (1934), for example, the Court held that the United States was not an indispensable party to an action seeking to enjoin officials from preventing the payment of military retirement benefits. *See also Smith* v. *Jackson*, 246 U.S. 388, 391 (1918) (order requiring auditor to release salary to federal employee is not a judgment "for money but relates solely to the obligation to perform a manifest public duty"). Here as well, the Secretary may be enjoined to comply with the Medicaid Act, even if this requires the release of appropriated federal funds.

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[39] *See also* City of Los Angeles v. Coleman, 397 F. Supp. 547 (D.D.C. 1975); People *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721, 724 (N.D. Ill. 1973); City of New York v. Ruckelshaus, 358 F. Supp. 669 (D.D.C. 1973), *aff'd sub nom.* City of New York v. Train, 494 F.2d 1033 (D.C. Cir. 1974), *aff'd*, 420 U.S. 35 (1975).

CONCLUSION

The judgments of the court of appeals should be affirmed in part and reversed in part, and the cases remanded with instructions that the district court had authority to order complete relief in favor of the state.

Respectfully submitted,

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